90-1178

No.

Supreme Court, U.S.
FILED
JAN 18 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,
Petitioners,

v.

WILLARD A. THOMPSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

PETITION FOR A WRIT OF CERTIORARI

DAVID W. KERBER *
KEVIN W. HECHT
KELLY, STANSFIELD & O'DONNELL
550 15th Street, Suite 900
Denver, Colorado 80202
(303) 825-3534

JAMES R. MCCOTTER
General Counsel
PUBLIC SERVICE COMPANY
OF COLORADO
550 15th Street, Suite 890
Denver, Colorado 80202
(303) 571-7161

Attorneys for Public Service Company of Colorado and R. M. Richards

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Are statements made by an employer to an employee in disciplinary letters which are required by past practice pursuant to a collective bargaining agreement absolutely privileged for the reason that any state law claim of defamation is pre-empted by federal labor policy?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. The Decision Below Raises Significant And Recurring Problems Concerning The Ability Of Supervisors To Truthfully And Forcefully Communicate With Their Employees And Union Representatives Without Fear Of Personal Liability For Statements Made In Disciplinary Letters And Grievance Proceedings	5
II. The Decision Below Raises A Conflict Between The Colorado Supreme Court, The Tenth And The Ninth Circuit Courts Of Appeals, The Supreme Court Of Alabama, The Supreme Court Of Michigan And The Supreme Court Of Nebraska	13
CONCLUSION	17
APPENDIX A	
Colorado Supreme Court Opinion	1a
APPENDIX B	
Colorado Court of Appeals, Division III Opinion	19a
APPENDIX C	
Order, District Court, City and County of Denver, State of Colorado	28a
APPENDIX D	
Petitioners' Motion for Summary Judgment to District Court, City and County of Denver, State of Colorado	30a

TABLE OF AUTHORITIES

CASES: Page

Agriss v. Roadway Express, Inc., 334 Pa.Super. 295, 483 A.2d 456 (Pa.Super.Ct. 1984) 16
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) 10
Bird v. Meadow Gold Products Corp., 60 Misc.2d 212, 302 N.Y.S.2d 701 (Sup.Ct. 1969) 16
Brooks v. Solomon Co., 542 F.Supp. 1229 (N.D.Ala. 1982) 12, 15
Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) .. 14
Ezekiel v. Jones Motor Co., 374 Mass. 382, 372 N.E.2d 1281 (1978) 16
Fulghum v. United Parcel Service, Inc., 424 Mich. 89, 378 N.W.2d 472 (1985) 15
General Motors Corp. v. Mendicki, 367 F.2d 66 (10th Cir. 1966) 4, 10, 14, 15
Goldberg v. Kelly, 397 U.S. 254 (1970) 5
Green v. Hughes Aircraft Co., 630 F. Supp. 423 (S.D.Cal. 1985) 15
Hasten v. Phillips Petroleum Co., 640 F.2d 274 (10th Cir. 1981) 5, 10, 14
Honaker v. Florida Power & Light, 95 LRRM 3265 (M.D.Fla. 1977) 15
Hull v. Central Transport, Inc., 628 F. Supp. 784 (N.D.Ind. 1986) 15
Hyles v. Mensing, 849 F.2d 1213 (9th Cir. 1988) .. 14
Joftes v. Kaufman, 321 F. Supp. 660 (D.D.C. 1971) 10, 12, 16
Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989) 14
Kloch v. Ratcliffe, 221 Neb. 211, 375 N.W.2d 916 (1985) 15
Krasinski v. United Parcel Service, Inc., 121 Ill.2d 183, 530 N.E.2d 168 (1988) 8, 16
Lingle v. Norge Division, 486 U.S. 399 (1988) ... 9, 10, 12
Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) 11, 12
Louisville & Nashville R.R. Co. v. Marshall, 586 S.W.2d 274 (Ky.Ct.App. 1979) 16

TABLE OF AUTHORITIES—Continued

Page

Macy v. Trans World Airlines, Inc., 381 F. Supp. 142 (D.Md. 1974) 15
Nelson v. Lapeyrouse Grain Corp., 534 So.2d 1085 (Ala. 1988) 15
Reynolds Metals Co. v. Mays, 547 So.2d 518 (Ala. 1989) 15
Rougeau v. Firestone Tire & Rubber Co., 274 So.2d 454 (La.App. 1973) 16
Seid v. Pacific Bell, Inc., 635 F. Supp. 906 (S.D. Cal. 1985) 15
Shane v. Greyhound Lines, Inc., 868 F.2d 1057 (9th Cir. 1989) 14
Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962) 7
Textile Workers v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) 7, 13
Turner v. Gateway Transportation Co., 569 S.W.2d 358 (Mo.App. 1978) 16
United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960) 7
United Steelworkers v. Rawson, —— U.S. ——, 110 S.Ct. 1904 (1990) 9, 11, 12

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. Const. amend. VI 5
28 U.S.C. § 1257(a) 2
28 U.S.C. § 1332 14
29 U.S.C. § 159(a) 3, 8
29 U.S.C. § 171(a) 2, 6, 10, 12
29 U.S.C. § 173(d) 7
29 U.S.C. § 185 ..... 2, 7, 9, 11, 15

MISCELLANEOUS:

Elkouri and Elkouri, *How Arbitration Works*, 673-674 (4th ed. 1985) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. ———

PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,
Petitioners,

v.

WILLARD A. THOMPSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

---

PETITION FOR A WRIT OF CERTIORARI

The petitioners, Public Service Company of Colorado and R. M. Richards, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Colorado entered in this proceeding on October 22, 1990.

OPINIONS BELOW

The Opinion of the Supreme Court of Colorado is reported at 800 P.2d 1299 (Colo. 1990) and appears in Appendix A hereto at pp. 1a-18a. The Decision of Division III of the Colorado Court of Appeals is reported at 773 P.2d 1103 (Colo.App. 1988) and appears in Appendix B hereto at pp. 19a-27a. The Order of the District Court, City and County of Denver, was unreported and appears in Appendix C hereto at pp. 28a-29a.

JURISDICTION

The judgment of the Supreme Court of the State of Colorado was entered on October 22, 1990. This Petition for Certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§ 171. Declaration of purpose and policy

It is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

§ 185(a). Venue, amount and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This case arose out of two disciplinary letters given to Respondent by his supervisor, Petitioner, Mark Richards. The first involved a situation where Respondent was disciplined as a result of his conduct at a building owned by the State of Colorado, a customer of Petitioner Public

Service Company of Colorado.[1] As a result of Respondent's conduct, he was suspended for five days and given a letter of suspension charging him with sexually harassing some of the employees of the State of Colorado. Respondent, being a member of International Brotherhood of Electrical Workers, Local No. 111, filed a grievance under the Public Service Company I.B.E.W. Local No. 111 Collective Bargaining Agreement (hereinafter "Collective Bargaining Agreement") to challenge the suspension. At the second step of the grievance procedure mandated by the Collective Bargaining Agreement, Public Service, the Union and Respondent all agreed to settle the matter by reducing the suspension from five days to two days. Additionally, Respondent agreed to go to counseling and the word "sexual" was removed from the letter of suspension.

The second letter was a written reprimand issued several months later. Respondent had been placed on "evidence of illness" which, pursuant to the terms of the Collective Bargaining Agreement, required him to provide a doctor's certificate before he was allowed to claim sick time on his time card. Respondent nevertheless claimed sick time on his time card without a doctor's certificate. As a result, his supervisor, Mr. Richards, disciplined Respondent for falsifying his time card by claiming sick time. Respondent presented his grievance of this letter directly to his third level supervisor as he was entitled to do pursuant to Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a). The third level supervisor voided the written reprimand and issued another written reprimand to Respondent stating that Respondent's entry on his time card indicated ignor-

[1] Subsidiaries of Public Service Company of Colorado which are not wholly-owned subsidiaries are Aquafarm Associates of Colorado, Inc., Natural Fuels Corporation, Fisher Ditch Company, United Water Company, The Hillcrest Ditch and Reservoir Company, The East Boulder Ditch Company, Las Animas Consolidated Canal Company, and The Consolidated Extension Canal Company. (Rule 29.1)

ance of the required policy/procedures and malingering. This revised written reprimand was not challenged by Respondent. Both letters were sent to Respondent's Union representative pursuant to past practice agreed to by the parties that all disciplinary notices be in writing and be sent to the Union.[2]

Then, several months later, Respondent brought suit against his supervisor, Mark Richards, and Public Service Company of Colorado, Petitioners here, alleging that the contents of the letters of suspension and written reprimand were libelous.

On October 14, 1986, Petitioners filed a Motion for Summary Judgment before the Trial Court arguing, among other things, that the contents of the disciplinary letters were absolutely privileged, and therefore the case should be dismissed, inasmuch as any claim of defamation by an employee covered by a collective bargaining agreement relating to statements made in disciplinary proceedings was pre-empted by federal labor law. (Appendix D at pp. 30a-31a). The Trial Court did not rule on Petitioner's federal claims, but did grant the Motion for Summary Judgment based upon state law considerations. (Appendix C at pp. 28a-29a).

The Court of Appeals for the State of Colorado affirmed the Trial Court's decision but on the alternate federal grounds. The Court of Appeals determined that the statements in the disciplinary letters were absolutely privileged under federal labor law, following *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966),

---

[2] Pursuant to Article 30 of the Collective Bargaining Agreement between the I.B.E.W. and Public Service Company, the parties agreed that any and all practices mutually agreed to and accepted by the parties shall continue unless changed pursuant to the provisions of the Agreement. Disciplinary actions were required by past practice to be in writing and mailed to the Union thus making this requirement a part of the Collective Bargaining Agreement through Article 30.

and *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981). (Appendix B at p. 23a).

The Supreme Court of Colorado reversed the decision of the Court of Appeals, determining that statements made in disciplinary letters and grievance proceedings were not absolutely privileged, but were only subject to a qualified privilege. Since Respondent had alleged in his pleadings that the statements were made with malice, the Supreme Court determined that a genuine issue of fact remained and remanded the matter for trial. (Appendix A at p. 18a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises Significant And Recurring Problems Concerning The Ability Of Supervisors To Truthfully And Forcefully Communicate With Their Employees And Union Representatives Without Fear Of Personal Liability For Statements Made In Disciplinary Letters And Grievance Proceedings.

In the history of American jurisprudence, notice of the offense with which one is charged is an essential element of fairness. U.S. Const. amend. VI. Individuals need to know what charges are brought against them so that they can appropriately and fully respond to them. *Id.; Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970).

The same is true in the employment context. When an employee is charged with committing an offense against his employer, an essential element of fairness is that the employee know of the misconduct charged so that he can respond to the charge and challenge it if appropriate. Elkouri and Elkouri, *How Arbitration Works*, 673-674 (4th ed. 1985).

The process through which an employee is informed of offenses committed against his employer is either by oral communication from his or her supervisor or through written notice. Written notices are the more ap-

propriate vehicle for counseling, warning and communicating with an employee inasmuch as the direction and instruction contained in the written notice lessen the possibility of misunderstanding among the parties and increase the degree of industrial due process that a disciplined employee is accorded. (Appendix B at p. 26a).

The decision of the Colorado Supreme Court being challenged here subjects supervisors to potential individual liability and debilitating trials for statements made in the course of their duties and pursuant to the requirements of collective bargaining agreements that they provide written disciplinary notices to employees and attend and participate in grievance adjustment sessions. The decision of the Colorado Supreme Court chills the ability of the Company and the Union to deal with each other to resolve problems in the workplace because under the decision, supervisors and employers in general will be reluctant to vigorously and fully state what the problem is for fear of being required to defend the statements in lengthy and costly litigation.

Also, employers will be less likely to resolve grievances or to accommodate employees in the adjustment of disciplinary notices, for such adjustment or compromise might provide an evidentiary basis for the employee to argue in a defamation action that the accommodation by the employer in changing the disciplinary notice shows that the initial notice was untrue.

A stated purpose of the Labor Management Relations Act of 1947, 29 U.S.C. § 171(a), is to promote industrial peace by the settlement of issues between employers and employees through the process of conference and collective bargaining between employers and the representatives of their employees. The Act also provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining

agreement." 29 U.S.C. § 173(d). The grievance machinery created by the collective bargaining system is at the very heart of the system of industrial self-government, and the grievance procedure is a part of the continuous collective bargaining process. *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

This Court determined in *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), that Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, authorized federal courts to fashion a body of federal law common throughout the country. In *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962), this Court determined:

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of the process strikes at the very core of federal labor policy.

What the Colorado Supreme Court has done in this case is to inhibit and discourage the free flow of information through disciplinary letters required by the Collective Bargaining Agreement. As a result, the decision of the Colorado Supreme Court inhibits the free flow of information from supervisors to employees and their union representatives such that matters in the workplace can not be easily resolved. This outcome is contrary to federal labor policy.

The facts of this case provide a perfect example. One of the instances which gave rise to Respondent's claim of libel was a disciplinary letter of suspension for sexual harassment. The suspension was for five days. This matter was processed through the grievance procedure in a grievance filed by Respondent. (Appendix A at p. 4a). At the second step of the grievance procedure, the

matter was resolved by removing the offending word, "sexual," reducing the suspension from five days to two days, and requiring Respondent to receive counseling. (Appendix B at pp. 21a-22a). Under the new rule of law created by the Colorado Supreme Court, such a settlement would be very difficult since both the Company and supervisor would be required to be vigilant for the subsequent litigation which may be on the horizon.

Similar circumstances surround Respondent's second claim of libel, which resulted from a written warning stating that Respondent had falsified his time card. As a result of an appeal by Respondent directly to his third level supervisor, as allowed under 29 U.S.C. § 159(a), that supervisor voided the original written warning, but gave him another more acceptable warning, which found Respondent guilty of malingering. Again, such a resolution would not be likely where the supervisor would know that the change in the original warning would be evidentiary fodder for the employee in a subsequent defamation case. This is exactly what happened here. Respondent waited until these matters had been resolved amiably through the grievance process with the Respondent's union and the Respondent, and only then filed a defamation action seeking damages against his immediate supervisor and his employer.

In its decision, the Colorado Supreme Court provides only qualified immunity for those supervisors who are required by a collective bargaining agreement to issue written letters of disciplinary action. Therefore, in Colorado, they are entitled to immunity as long as the statements are shown not to have been made with actual malice. This, however, is of little comfort to any supervisor who is required to go to trial since inevitably the question of actual malice is one of fact which cannot be resolved by summary judgment. *Cf.*, Appendix A at pp. 15a-18a; *Krasinski v. United Parcel Service, Inc.*, 124 Ill.2d 483, 530 N.E.2d 468 (1988). It is not only the potential for personal liability but the process of going

through trial that chills the full and free discussion of views among employers, employees and unions. It is this impediment to the free flow of information in disciplinary letters and grievance proceedings that violates federal labor policy here.

The Supreme Court of Colorado spent a great deal of time determining that the case under review was not pre-empted under *Lingle v. Norge Division*, 486 U.S. 399 (1988). In *Lingle*, this Court determined that Section 301 pre-empts the application of state law in an action if such action requires the interpretation of the terms of the collective bargaining agreement. *Lingle* involved an employee who filed suit claiming retaliatory discharge because she had allegedly been fired for attempting to secure workers compensation benefits. Lingle was covered by a collective bargaining agreement which provided relief if she was discharged without just cause. The Court concluded that the state claim of retaliatory discharge would not be pre-empted merely because both proceedings would require the analysis of the same facts. *Id.* at 409-419.

However, this Court did not have an opportunity in *Lingle* to review a case such as presented here where the state claim, while not necessarily requiring the interpretation of the terms of the Collective Bargaining Agreement, nevertheless interferes with the discipline and grievance process arising out of the Collective Bargaining Agreement. *Cf., United Steelworkers v. Rawson*, —— U.S. ——, 110 S.Ct. 1904 (1990). In the case under review, federal labor policy would still require pre-emption of this cause of action because allowing the state defamation action to proceed would interfere with the discipline, grievance and arbitration process established in the Collective Bargaining Agreement. Therefore, while the Supreme Court of Colorado may have correctly applied the *Lingle* analysis in that the determination of Respondent's defamation claims may not require an interpretation of the Collective Bargaining

Agreement (Appendix A at pp. 6a-13a, Part B), it was wrong in Part C of its opinion (Appendix A at pp. 13a-15a) when it concluded that Respondent's claims were not pre-empted as a result of the interference with federal labor policy. This requires reversal of the Colorado Supreme Court decision.

Federal labor policy favors the peaceful resolution of labor grievances through conferences and bargaining processes. 29 U.S.C. § 171(a). *See, Mendicki*, 367 F.2d at 70; *Joftes v. Kaufman*, 324 F.Supp. 660, 663 (D.D.C. 1971). In light of the overriding policy to encourage, facilitate and effectuate the settlement of issues between employers and employees, an unqualified and absolute privilege should clearly be available with respect to all oral and written statements made in the course of grievance meetings and in disciplinary notices. *Hasten*, 640 F.2d at 278-279.

There is a fundamental distinction between pre-emption of state claims which interfere with the process of resolution of grievances and arbitrations and pre-emption of claims which may arise requiring interpretation of the terms of collective bargaining agreements. The Colorado Supreme Court has not recognized this distinction. What could interfere more with the process of coming to a full and fair resolution of matters brought to the attention of employers and ultimately processed through a grievance procedure than a state cause of action which forces all but the unwary to hold back as much as possible, settle as little as possible, and preserve their rights for developing evidence for the potential state court defamation litigation?

This Court in *Lingle* quoted its statement in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985) that:

> [t]he need to preserve the effectiveness of arbitration is one of the central reasons that underlay the Court's holding in *Lucas Flour*.

Lingle v. Norge, 486 U.S. at 411.

The effectiveness of arbitration will surely be diminished if there cannot be a full and fair disclosure of even the cause of the discipline which brings the employer, the employee and the union together to resolve the matter.

Additionally, this case is analogous to *United Steelworkers v. Rawson*, —— U.S. ——, 110 S.Ct. 1904 (1990). In that case, this Court determined that even though Rawson's tort claims could potentially be determined without interpretation of the provisions of the collective bargaining agreement, the claims could not be described as independent of the collective bargaining agreement since the duty the union assumed arose out of the agreement. Therefore, Rawson's tort claims were pre-empted under Section 301.

In this situation as well, the duties of the employer and its supervisors concerning the grievance procedure and issuing disciplinary notices arose out of the Collective Bargaining Agreement through its terms and past practice. Therefore, any defamation claims relating to those disciplinary notices or to statements made during grievance meetings cannot be described as independent of the Collective Bargaining Agreement, and they should be pre-empted under Section 301 as well.

Finally, the case of *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), holding that the National Labor Relations Act does not bar a civil action for libel under state law where defamatory statements were published during a union organizing campaign by the union and its officers, is not controlling. In *Linn*, exclusive jurisdiction was unsuccessfully sought on the basis of statements arguably made during the course of what the law forbids or discourages, an unfair labor practice. While the N.L.R.B. has jurisdiction over claims of unfair labor practice, there is no federal policy reason to shield the alleged libeler from an action seeking damages for a libel made during the course of an unfair labor practice. Here, statements made in grievance proceedings and dis-

ciplinary letters rather than being discouraged by federal law, are encouraged by federal law; federal policy being to encourage the peaceful disposition of grievance issues. 29 U.S.C. § 171(a). While the libelous statements considered in *Linn*, and the context in which they were uttered, constituted conduct which was merely a "peripheral concern" of the N.L.R.B., the circumstances giving rise to the action at bar involve interests which necessarily require the uniform employment of federal law in order to prevent the impairment of national labor policy. *Brooks v. Solomon Co.*, 542 F.Supp. 1229, 1233-1234 (N.D.Ala. 1982).

An additional rationale in this Court's decision in *Linn* was that the remedial provisions of labor law offered no possibility of relief for the injury allegedly suffered by the official involved. *Linn*, 383 U.S. at 63; *see also, Joftes v. Kaufman*, 324 F.Supp. 660, 664 (D.D.C. 1971). Here, on the other hand, Respondent had available to him an opportunity through the grievance procedure to secure personal relief and vindication. To allow him to proceed instead by way of a burdensome, expensive and vexatious libel suit against individuals who did no more than fulfill their duty to inform him of the reasons for his discipline would indeed be subversion of the carefully constructed system of procedures and remedies for employment disputes. *Joftes v. Kaufman*, 324 F.Supp. at 664.

Therefore, while under *Lingle* a claim will not be pre-empted when it is not necessary to interpret the terms of the labor agreement, it should be pre-empted when the duty to act arises out of that collective bargaining agreement as in *Rawson*. Also, defamation claims should be pre-empted when they interfere with the disciplinary, grievance or arbitration processes provided for in those collective bargaining agreements. Such defamation claims in those circumstances interfere with the national labor policy to provide for a quick, efficient and orderly resolu-

tion of employee labor disputes and therefore should be pre-empted under federal labor policy.

The decision of the Supreme Court of Colorado interferes with that uniform federal labor policy, because under it, a supervisor is not free to speak his or her mind or tell the employee what charge he or she is facing without fear of personal liability, while supervisors in other states are free to continue the full free flow of information between employer, employee and union. Because this is a recurring issue, the Court should review this matter to establish a uniform federal policy for determining the pre-emption of defamation claims arising out of the disciplinary, grievance and arbitration process.

II. The Decision Below Raises A Conflict Between The Colorado Supreme Court, The Tenth And The Ninth Circuit Courts Of Appeals, The Supreme Court Of Alabama, The Supreme Court Of Michigan And The Supreme Court Of Nebraska.

As stated in *Textile Workers v. Lincoln Mills*, 353 U.S. at 451, the Labor Management Relations Act authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. The underlying principle of this rule is that federal labor policy emanating from the Labor Management Relations Act should be applied in Colorado as it is in New York or California.

The case law cited in the decision of the Colorado Supreme Court itself clearly demonstrates that whether a statement made during the discipline or grievance process is absolutely or only qualifiedly privileged is subject to the whim of geography or jurisdiction. The most striking example of this is the conflicting decisions within the 10th Circuit, of which Colorado is a part. The Colorado Supreme Court determined that:

> [A] state law defamation action based upon statements made in a grievance or disciplinary proceeding

> may go forward when the state law recognizes a qualified privilege for communications made in the course of the disciplinary or grievance proceedings.

(Appendix A at p. 15a)

In *Mendicki*, 367 F.2d 66, the Tenth Circuit held that statements made during the grievance process and grievance proceedings were absolutely privileged. *In Hasten*, 640 F.2d 274, the Tenth Circuit concluded that disciplinary notices were also absolutely privilged under federal labor policy. In the instant case, the Colorado Supreme Court determined that the Tenth Circuit's decisions in *Hasten* and *Mendicki* are in error on a question of federal law. As such, should a defendant be lucky enough to have diverse citizenship (28 U.S.C. § 1332) or be able to remove the case to federal court and pursuant to *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), avoid artful pleading, the decision of the Tenth Circuit would be that such disciplinary letters would be absolutely privileged. However, a defendant not so fortunate as to be able to gain the federal forum in Colorado would only have a qualified privilege if the decision of the Colorado Supreme Court is allowed to stand.

There is also a substantial split of authority throughout the rest of the country. In the case of *Hyles v. Mensing*, 849 F.2d 1213, 1217 (9th Cir. 1988), the Ninth Circuit held statements made during grievance proceedings to be absolutely privileged. Similarly, in the case of *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1063 (9th Cir. 1989), the Ninth Circuit, while expressly reserving ruling on whether to adopt the *Hasten* rationale, held that when a collective bargaining agreement requires employers to notify employees and the union in writing of intended discipline, any claim based upon the discharge notification is therefore inextricably intertwined with the collective bargaining agreement and is pre-empted.[3]

---

[3] In an Eighth Circuit case, *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989), a libel claim based upon accusations by

In *Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085 (Ala. 1988), the Alabama Supreme Court determined that testimony given during grievance proceedings was absolutely privileged.[4] The Supreme Court of Michigan has determined that accusations of dishonestly made at the time of a suspension prior to discharge are absolutely privileged. *Fulghum v. United Parcel Service, Inc.*, 424 Mich. 89, 378 N.W.2d 472 (1985). In *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985), the Supreme Court of Nebraska, following *Mendicki*, determined that statements made in a Railway Labor Act proceeding are absolutely privileged.[5]

---

employees that an individual slashed tires was determined to be pre-empted by Section 301, 29 U.S.C. § 185, inasmuch as the judicial resolution of the libel allegation would necessarily involve the interpretation of the collective bargaining agreement to determine whether the plaintiff was wrongfully discharged.

[4] However, while the Supreme Court of Alabama recognized one part of the absolute privilege doctrine when it held that statements made during grievance proceedings are absolutely privileged, it also has held that oral statements and telegrams notifying an individual of suspension and then ultimate termination are subject to only a qualified privileged. *Reynolds Metals Co. v. Mays*, 547 So.2d 518 (Ala. 1989).

[5] In addition to these decisions of the federal Courts of Appeals and Supreme Courts of several states, lower courts have also determined for various reasons that statements made during grievance proceedings and disciplinary proceedings are absolutely privileged. *See, Hull v. Central Transport, Inc.*, 628 F.Supp. 784 (N.D.Ind. 1986) (statements made during grievance proceedings are absolutely privileged); *Seid v. Pacific Bell, Inc.*, 635 F.Supp. 906 (S.D.Cal. 1985) (Section 301 pre-empts claim for defamation based on statements made in an investigation pursuant to the collective bargaining agreement); *Green v. Hughes Aircraft Co.*, 630 F.Supp. 423 (S.D. Cal. 1985) (statements uttered within the context of an initial report and investigation are absolutely privileged); *Brooks v. Soloman Co.*, 542 F.Supp. 1229 (N.D.Ala. 1982) (statements made during grievance proceedings were absolutely privileged); *Honaker v. Florida Power & Light*, 95 LRRM 3265 (M.D.Fla. 1977) (statements made in an informal meeting which preceded the filing of a formal written grievance are absolutely privileged); *Macy v. Trans*

On the other side of the issue, in addition to the Colorado Supreme Court, there are a minority of jurisdictions which would hold that statements made during grievance proceedings or in disciplinary letters have only a qualified privilege.[6]

As is clear by the extreme divergence of authority cited above, this case provides an excellent opportunity to settle once and for all what the law should be concerning preemption of defamation claims arising out of the disciplinary and grievance process envisioned in collective bargaining agreements. Due to the requirement to have a uniform federal labor policy, the Court should take this opportunity to review this case and resolve these conflicts.

World Airlines, Inc., 381 F.Supp. 142, 148 (D.Md. 1974) (statements and written communications made to an employee concerning discharge as a result of grievance proceedings are absolutely privileged under the Railway Labor Act); *Joftes v. Kaufman*, 324 F.Supp. 660 (D.D.C. 1971) (statements made providing reasons for dismissal are absolutely privileged inasmuch as by being a member of the bargaining unit, one consents to such notices); *Louisville & Nashville R.R. Co. v. Marshall*, 586 S.W.2d 274 (Ky.Ct.App. 1979) (letter concerning work and probationary period under the collective bargaining agreement is absolutely privileged); *Rougeau v. Firestone Tire & Rubber Co.*, 274 So.2d 454 (La.App. 1973) (statements made during an investigation are absolutely privileged); *Turner v. Gateway Transportation Co.*, 569 S.W.2d 358 (Mo.App. 1978) (disciplinary letter sent to union council was consented to by plaintiff and therefore absolutely privileged); *Agriss v. Roadway Express, Inc.*, 334 Pa.Super. 295, 483 A.2d 456 (Pa.Super.Ct. 1984) (publication of a warning letter was absolutely privileged).

[6] *See, Krasinski v. United Parcel Service, Inc.*, 124 Ill.2d 483, 530 N.E.2d 468 (1988) (statements made by supervisors informing plaintiff of charges against him and statements in a notice of termination were determined to have only a qualified privilege); *Ezekiel v. Jones Motor Co.*, 374 Mass. 382, 372 N.E.2d 1281 (1978) (defamatory statements made during joint management and union board meeting have only qualified privilege); *Bird v. Meadow Gold Products Corp.*, 60 Misc.2d 212, 302 N.Y.S.2d 701 (Sup.Ct. 1969) (defamatory statements made during grievant's adjustment conference have only unqualified privilege, but held that privilege was not abused).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Colorado.

Respectfully submitted,

DAVID W. KERBER *
KEVIN W. HECHT
KELLY, STANSFIELD & O'DONNELL
550 15th Street, Suite 900
Denver, Colorado 80202
(303) 825-3534

JAMES R. MCCOTTER
General Counsel
PUBLIC SERVICE COMPANY
OF COLORADO
550 15th Street, Suite 890
Denver, Colorado 80202
(303) 571-7161

Attorneys for Public Service Company of Colorado and R. M. Richards

* Counsel of Record

APPENDICES

APPENDIX A

October 22, 1990

SUPREME COURT, STATE OF COLORADO

No. 89SC107

WILLARD A. THOMPSON,
Petitioner,

v.

PUBLIC SERVICE COMPANY OF COLORADO, a corporation; and R. M. RICHARDS a/k/a MARK RICHARDS,
Respondents.

Certiorari to the Colorado Court of Appeals

EN BANC
JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

JOSEPH P. GENCHI
Estes Park, Colorado
Attorney for Petitioner

DAVID W. KERBER
KEVIN W. HECHT
KELLY, STANSFIELD & O'DONNELL
Denver, Colorado
Attorneys for Respondents

JUSTICE MULLARKEY delievered the Opinion of the Court.

JUSTICE VOLLACK does not participate.

We granted certiorari to review the decision of the court of appeals in *Thompson v. Public Service Co.*, 773 P.2d 1103 (Colo. Ct. App. 1988), affirming a summary judgment against the plaintiff in a defamation action against his employer. We reject the conclusion of the court of appeals that, under federal labor law, statements made by an employer in a notice of discipline may not be the basis of a defamation action, and we reverse the decision of the court of appeals because we conclude that under state law the trial court improperly granted summary judgment on the plaintiff's claims.

I.

The plaintiff, Willard A. Thompson, was formerly an employee of the defendant, Public Service Company of Colorado (Public Service).[1] He is now retired. During the periods relevant to this dispute, Thompson's supervisor was defendant R. M. Richards; Public Service workers were represented by Local Union No. 111 of the International Brotherhood of Electrical Workers (IBEW), which had entered into a collective bargaining agreement with Public Service. Thompson in his pleadings before the district court raised two separate claims of defamation. The first claim is related to the events of November 17, 1983. On that day, Thompson and two other employees were sent to the state steam plant in Denver to perform maintenance work on the boilers in the basement. At some point, Thompson's companions left the building to retrieve supplies. Thompson thereafter left his work area and went upstairs to an area frequented by state employees. He saw a bulletin board, on which was posted a notice of a Christmas party for state employees. Thomp-

[1] Because this action was disposed of on summary judgment, we must reconstruct the factual background from the parties' pleadings, affidavits and depositions. To the extent there is a factual dispute, we defer to the allegations made by the defendant in the trial court.

son then attempted to learn who was in charge of the party so that could offer to play the piano or organ at the party. Thompson indicated in his affidavit before the trial court that, on prior occasions, persons had engaged him to provide musical services at various private functions. According to Thompson, the persons working in the area were unresponsive and he subsequently departed the area without incident.

Shortly thereafter, according to Richards, Vic Cook, a supervisor of state employees at the steam plant, telephoned Richards and told him that Thompson's contacts with state employees constituted a "nuisance." Following Cook's complaint, Richards removed Thompson from the state plant and summoned him to a meeting with Richards and the union steward, who was present because of the potential for the imposition of discipline on Thompson. According to Richards, his subsequent investigation revealed that Thompson, on November 17, 1983, was loitering about the administrative offices at the state steam plant, copying the telephone numbers and the names of the female employees. Further, Thompson allegedly asked the employees "personal questions" concerning their Christmas party and their phone numbers. Richards stated in his deposition that he believed "this unwanted attention by plaintiff toward the female employees constituted sexual harassment."

On December 6, 1983, Richards issued a letter of disciplinary suspension, informing Thompson that he was suspended for five days without pay. The disciplinary action, according to the letter, was "based on [Thompson's] poor work performance, creating a nuisance for customer employees and sexual harassment and or unwanted contact of customer employees." Copies of the suspension letter were given to Ray L. Dudley, Thompson's second-level supervisor, Ken L. Barnett, a Public Service production manager and third-level supervisor, and Public Service's Labor Relations Department. A copy of the letter

was also given to the IBEW union steward and a copy was placed in Thompson's personnel file. Pursuant to the collective bargaining agreement between Public Service and the IBEW, Thompson challenged the suspension through a "Step 1 Grievance." At the initial grievance review, Thompson was denied relief. However, upon further review [Step 2 review] on January 19, 1984, the five-day suspension was reduced to two days and the word "sexual" was removed from the discipline letter so that it merely stated "harassment." Thompson did not contest further the disciplinary action.

Thompson's second claim for defamation stemmed from a June 29, 1984 reprimand for "falsification of time card." That charge was based on Thompson's completion of a time card for June 5, 1984, as a day on which he took "sick leave." According to Richards, because Thompson failed to obtain a doctor's excuse for the sick day, and because this requirement had previously been made known to Thompson, the filing of the time card "constituted a falsification of the time card." Copies of this written reprimand were once again sent to the two higher level Public Service supervisors, as well as to the IBEW and the Public Service Labor Relations Department. A copy of the second reprimand was also placed in Thompson's personnel file. After a meeting between Thompson and his third-level supervisor Barnett, the reprimand was revised so as to delete the reference to "falsification," stating instead that Thompson's incorrect entry on his time card indicated that he "ignor[ed] the required policy procedures" and this conduct constituted "malingering." Thompson did not challenge this disciplinary action.

On December 3, 1984, Thompson filed this action in Denver District Court against Public Service and Richards, alleging defamation on the basis of the two letters of reprimand. On Public Service's motion for summary judgment, the district court ruled that Public Service's

statements in the discipline notices were protected by a qualified privilege under state law, and that because no genuine issue of fact existed concerning the question of malice, summary judgment was appropriate. The court of appeals affirmed the judgment of the trial court on a different legal theory. It held that under § 301 of the Labor Management Relations Act of 1947 (the LMRA), 29 U.S.C. § 185 (1982), statements made in written notices of discipline leading up to a grievance procedure as provided for in a collective bargaining agreement are protected by an "absolute privilege" precluding the bringing of a state law defamation claim based on such statements. *Thompson v. Public Serv. Co.*, 773 P.2d at 1106. We granted certiorari to consider whether federal labor law, under the circumstances of this case, requires the recognition of an unqualified rather than a qualified privilege, as previously recognized by this court under state law with respect to statements similar to those made here.

II.

A.

Before addressing the scope of the privilege with respect to the statements contained in the discipline notices in this case, we note that this court has already decided this issue under Colorado law, most recently in *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988). In *Churchey*, we applied well-established Colorado case law in finding that the statements made by the employer Coors to the employee Churchey explaining that she had been terminated because of "dishonesty" were protected by a qualified privilege. In the face of a defendant's qualified privilege, we held that a plaintiff could recover on a defamation claim only by showing that the defendant "publishe[d] the material with malice, that is, knowing the matter to be false, or act[ed] in reckless disregard as to its veracity." *Churchey*, 759 P.2d at 1346 (*quoting Dominguez v. Babcock*, 727 P.2d 362, 366,

(Colo. 1986)). *See also Abrahamsen v. Mountain States Tel. & Tel. Co.*, 177 Colo. 422, 494 P.2d 1287 (1972) (qualified privilege applies as to inter-office memoranda); *Denver Pub. Warehouse Co. v. Holloway*, 34 Colo. 432, 83 P. 131 (1905) (qualified privilege protects the right of corporate officers to communicate with one another about their employees' conduct). *Churchey* and the earlier cases clearly establish that, under Colorado law, statements such as those made by the defendants here are protected by a qualified privilege, not by an unqualified privilege.

Thus, unless the defendants can show that federal law requires a different standard under the facts of this case, we must conclude that the statements were protected by a qualified privilege. In urging that we recognize an unqualified privilege under the facts of this case, defendants argue that to hold otherwise would "interfere with the discipline, grievance, and arbitration process contrary to federal labor policy arising under section 301 of the LMRA." However, we do not agree that § 301 supports the recognition of an unqualified privilege under federal law.

B.

The Supreme Court on a number of occasions has stated the test for determining whether § 301 "preempts" state law tort claims. Most relevant to the circumstances presented by this case is *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). The employee in that case pursued a remedy provided by the grievance procedure established under the collective bargaining agreement between her union and the company. *Lingle*, 486 U.S. at 401. Simultaneously with the grievance procedure, however, the employee filed a wrongful discharge action in state court alleging that the defendant had fired her, contrary to the public policy of the state, because she filed a worker's compensation claim. *Id.* at 402. Both the federal district court and the Seventh Circuit

Court of Appeals held that the state law claim was "inextricably intertwined" with the collective bargaining agreement and thus the state law claim was preempted. *Id.*

The Supreme Court disagreed, reaffirming its test for determining whether § 301 preempts a state tort law claim:

> [I]f the resolution of the state-law claim depends upon the meaning of the collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state law principles as there are States) is preempted and federal labor-law principles—necessarily uniform throughout the nation—must be employed to resolve the dispute."

Id. at 405-06. The court applied this test to the facts presented by *Lingle* and found that the state law claim for wrongful discharge was not preempted under § 301, even though the collective bargaining agreement in *Lingle* established a procedure for resolving claims that an employee's termination was not for just cause. *Id.* at 407. The Court held that the resolution of the Illinois wrongful discharge claim did not require the trial court to interpret any term of the collective bargaining agreement. *Id.* Thus, the state law remedy was "independent" of the collective bargaining agreement. The Supreme Court rejected the court of appeals' reasoning that the state law claim must be barred because "a state court would be deciding precisely the *same issue* as would an arbitrator: whether there was 'just cause' to discharge the worker." *Id.* at 408 (*quoting* decision below, 823 F.2d 1031, 1046 (7th Cir. 1987)) (emphasis supplied by the Supreme Court). In summary the Court concluded:

> [E]ven if the dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing

> precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 preemption purposes.

Id. at 409-10.

In support of their position that § 301 preempts Thompson's libel action here, the defendants points to a number of state and federal decisions, including *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966). Most of these cases, including *Mendicki*, predate the 1988 *Lingle* decision and their continuing validity is questionable. In *Mendicki*, the court of appeals reviewed a judgment in favor of the plaintiff on his claim that a company representative had slandered him at a grievance proceeding by stating that the company had known for years that the plaintiff had been taking property from the plant. *Mendicki*, 367 F.2d at 70. The statement was made at a hearing which was part of the process for appealing a grievance under a collective bargaining agreement between the employer and the union representing the employees. *Id.* at 68. In reversing the judgment in favor of the plaintiff, the court concluded that statements made at a grievance conference are unqualifiedly privileged. The court stated:

> If the representatives of either employer or employee were subject to an action for damages because of statements made of what they claimed to be the pertinent facts respecting a controversy under consideration and of their position respecting such matter and the reasons therefor, at a conference or collective bargaining session being held to adjust such controversy, the likelihood of the attainment of peaceful adjustments on disposition of the issues involved between them through the conference or bargaining processes would be greatly decreased.

Id. at 71. The *Mendicki* court did not specifically point to § 301 as providing the basis for its holding that the employer's statements in that case were protected by an unqualified privilege. In addition, it is not clear whether the holding of "unqualified privilege" in *Mendicki* was based on state or federal law. By using the term "privilege" rather than stating that state law and jurisdiction were preempted, the court in *Mendicki* may have indicated it was applying state defamation law, not ruling that state defamation remedies were preempted. *See, e.g.*, Comment, *The Availability of Defamation Remedies for Statements Made During the Course of Labor Grievance Arbitration Proceedings*, 15 U. Kan. L. Rev. 553 (1967) (making a similar argument). Nevertheless, some subsequent cases have interpreted the *Mendicki* opinion as establishing an "unqualified privilege" under federal labor law.

In *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981), the court of appeals reaffirmed the validity of *Mendicki* and extended it beyond the context of the grievance proceeding to cover a letter sent by the employer to the employee informing the employee that he was being terminated for "dishonesty." *Hasten*, 640 F.2d at 275. The *Hasten* court was clear in stating its conviction that federal labor law compelled the recognition of an unqualified privilege encompassing the statements at issue:

> We are not persuaded by the plaintiff's arguments that the instant case should be distinguished from *Mendicki* or that Supreme Court decisions now dictate a contrary rule. Considering the factors identified by the Supreme Court, we remain persuaded that federal labor law and policy require the absolute privilege rule as to communications made within the context of proceedings provided for by the collective bargaining agreement and its provisions for a grievance machinery.

Id. at 278. As with the *Mendicki* decision, the court in *Hasten* did not cite § 301 as the source for the unqualified privilege.

The principle of "unqualified privilege" recognized in *Mendicki* and *Hasten* has been followed in some federal court decisions, but the courts are often imprecise in stating the basis for their holdings. *See Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057 (9th Cir. 1989) (unqualified privilege protects statements made in employer's notice of intent to discipline); *Hyles v. Mensing*, 849 F.2d 1213 (9th Cir. 1988) (federal labor policy and federal labor law require recognition of privilege so as to bar state defamation claims based on statements made in grievance proceedings); *Hull v. Central Transp., Inc.*, 628 F. Supp. 784 (N.D. Ind. 1986) (statements made in grievance proceedings are absolutely privileged, apparently under § 301 of LMRA); *Green v. Hughes Aircraft Co.*, 630 F. Supp. 423 (S.D. Cal. 1985) (statements in employer's initial discipline report stating that plaintiff employee had stolen a sandwich protected by absolute privilege); *Brooks v. Solomon Co.*, 542 F. Supp. 1229 (N.D. Alabama 1982) (absolute privilege for statements made at grievance hearing). *Accord, Surrency v. Harbison*, 489 So. 2d 1097 (Ala. 1986); *Louisville & Nashville R.R. Co. v. Marshall*, 586 S.W.2d 274 (Ky. Ct. App. 1979). Other federal cases specifically have held that § 301 preempts state law defamation claims. *See Willis v. Reynolds Metals Co.*, 840 F.2d 254 (4th Cir. 1988) (employee's state law claim that personnel manager slandered her during informal discipline meeting preempted by § 301); *Seid v. Pacific Bell, Inc.*, 635 F. Supp. 906 (S.D. Cal. 1985) (§ 301 preempts state claim for defamation based on statements made in investigation subject to collective bargaining agreement).

Some state courts which have recognized an absolute privilege either have done so under state law or have been unclear whether their recognition of the privilege was

under state or federal law. *See Petyan v. Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986); *Rougeau v. Firestone Tire & Rubber Co.*, 274 So. 2d 454 (La. Ct. App. 1973); *Fulghum v. United Parcel Serv.*, 424 Mich. 89, 378 N.W.2d 472 (1985); *Turner v. Gateway Transp. Co.*, 569 S.W.2d 358 (Mo. Ct. App. 1978); *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985); *Agriss v. Broadway Express, Inc.*, 334 Pa. Super. 295, 483 A.2d 456 (1984). *See also* Annotation, *Libel and Slander: Privileged Nature of Communications Made in Course of Grievance or Arbitration Procedure Provided for by Collective Bargaining Agreement*, 60 A.L.R.3d 1041 (1974).

Other courts, however, have not agreed that federal labor law requires an absolute privilege to be granted to statements made in the course of a grievance proceeding or in related written documents and oral discussions. State courts in New York, Massachusetts, Illinois and Ohio have rejected the holdings of *Mendicki* and *Hasten*. In *Bird v. Meadow Gold Products Corp.*, 60 Misc. 2d 212, ——, 302 N.Y.S.2d 701, 704-705 (N.Y. Sup. Ct. 1969), the court rejected the reasoning of *Mendicki* and applied principles of qualified immunity under New York law even though the plaintiff employee claimed that his employer had slandered him in the course of a conference held pursuant to a collective bargaining agreement between his union and his employer. The Supreme Judicial Court of Massachusetts in *Ezekiel v. Jones Motor Co.*, 374 Mass. 382, 372 N.E.2d 1281 (1978), agreed with the New York court's opinion in *Bird* and held that a qualified privilege applied to statements made in the course of a grievance procedure covered by a collective bargaining agreement. The court stated:

> We prefer the approach taken in *Bird v. Meadow Gold Prod. Corp., supra*, where the New York court rejected the *Mendicki* rationale and held that allegedly defamatory statements were qualifiedly privileged when made at a conference pursuant to a col-

> lective bargaining agreement. The court found no congressional legislation specifically governing defamatory actions predicated on statements made during a labor grievance proceeding nor prohibiting a State court from regulating conduct in a manner consistent with national labor policies.

Ezekiel, 374 Mass. at ——, 372 N.E.2d at 1285. The court went on to hold that the policy concerns raised by the Tenth Circuit Court in *Mendicki* were sufficiently safeguarded by applying principles of qualified privilege stating:

> While the defendants do not clearly argue that this slander action in the State court is preempted by Federal labor legislation, they do urge that they should be immune from liability to avoid frustrating the policies expressed in this Federal labor legislation. Protecting its residents from slander has long been a concern of the Commonwealth. A grant of the conditional privilege provides a sufficient safeguard against the dampening of free discussion of the pertinent facts important to the peaceful adjustment of grievances.

Ezekiel, 374 Mass. at ——, 372 N.E.2d at 1286. *Accord Fisher v. Illinois Office Supply Co.*, 130 Ill. App. 3d 996, 474 N.E.2d 1263 (1984); *see also Bailey v. Sams*, 24 Ohio App. 3d 137, 493 N.E.2d 966 (1985).

In our view, § 301 does not preempt Thompson's state law defamation claims. Here, as in *Lingle*, the resolution of the state law claims does not require the interpretation of the collective bargaining agreement. Each element of Thompson's case may be resolved without reference to the collective bargaining agreement. Moreover, this case presents a stronger case for permitting the state law action than *Lingle*. In *Lingle* the grievance proceeding and the wrongful discharge action decided, arguably, precisely the same issue: whether termination of the em-

ployee was proper. In contrast, a grievance proceeding like the one involved in this case does not necessarily decide the truth of the matters asserted in a letter of discipline, but in many instances may focus narrowly on the appropriateness of the particular discipline imposed.

The determinations in the grievance proceedings here, that the notices should be modified to change "sexual harassment" to "harassment" and to delete the reference to "falsification" of a time card, did not necessarily resolve the merits of the accuracy of these accusations. Rather, the changes may reflect a compromise entered into simply to resolve a dispute between an employee represented by a union and management. In any event, there was not a specific finding made as to the truth or falsity of the accusations made in the notices of discipline. To hold that a grievance is the sole remedy of an employee allegedly libeled by an employer would unjustly limit the employee's ability to remedy damage to his reputation. The collective bargaining agreement simply provides no mechanism for vindicating an employee's interest in protecting his good name from unjustified, knowingly false accusations of serious misconduct.

C.

We also reject the contention that an unqualified privilege is required under the rubric of "national labor policy." No United States Supreme Court decision has so held and, to the contrary, existing Supreme Court precedent suggests that a qualified privilege suffices.

In support of its holding recognizing the unqualified privilege, the Tenth Circuit Court of Appeals in *Hasten* explained its earlier *Mendicki* decision by stating that the recognition of the unqualified privilege was required because "the libel action would clearly call for adjudication of the merits of the allegations of dishonesty which were the core issue in the grievance proceeding." *Hasten*, 640

F.2d at 279. However, as noted above, this reasoning is undercut by the Supreme Court's decision in *Lingle* permitting a wrongful discharge claim to go forward in state court even though, under the terms of a collective bargaining agreement, a grievance procedure was established for determining whether an employee had been discharged for "just cause."

Moreover, the "qualified privilege" standard articulated by this court in *Dominguez* and *Churchey* is virtually indistinguishable from the standard approved by the Supreme Court in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974), and *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966). In *Linn*, the Court held that federal labor law permits the maintenance of a state law libel action by an official of an employer against a union for statements made during an organizing campaign. *Linn*, 383 U.S. at 55. The Court recognized that the state had an "overriding state interest" in protecting its residents from malicious libels. *Id.* at 61. The Court acknowledged that, to some extent, permitting the state law actions would conflict with the policies of the National Labor Relations Act, 29 U.S.C. § 141 *et seq.* (1964 ed.), of encouraging free debate. *Id.* at 64. However, the Court held that this risk could be minimized by allowing recovery on a state libel law action only if the plaintiff proves that the defendant acted with "malice" as defined by the Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Id.* at 65. In *Letter Carriers*, the Court reaffirmed its holding that a plaintiff could recover in a state libel law action in the labor dispute context only by proving that a defamatory publication was made with "knowledge of falsity or reckless disregard of the truth." *Letter Carriers*, 418 U.S. at 281.

The federal interest in free debate in the labor dispute context would seem to be quite similar to the federal interest in encouraging frank discussion in the context of

a grievance proceeding or a disciplinary action. The federal interest in maintaining a national labor policy is adequately safeguarded by requiring that the plaintiff, in order to recover in a defamation action based upon statements made in a grievance proceeding, prove that the dafamatory statements were made with knowledge of their falsity or with reckless disregard for whether or not they were true or false. Thus, we hold that a state law defamation action based upon statements made in a grievance or disciplinary proceeding may go forward when the state law recognizes a qualified privilege for communications made in the course of the disciplinary or grievance proceedings.

III.

Finally, we must consider whether summary judgment was proper here on Thompson's state law claim. In making this determination, we are guided by this court's decision in *Churchey*, 759 P.2d 1336. In *Churchey*, as here, the district court granted summary judgment against an employee on her defamation claim against her employer. *Churchey*, 759 P.2d at 1338. In *Churchey*, the plaintiff claimed that her employer libeled her by stating that the reason for her discharge was "dishonesty." *Id.* at 1341. In addressing the question of whether summary judgment was proper in that case, we engaged in a useful review of the relevant principles governing summary judgment. We stated:

> Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party. The party against whom summary judgment is sought is entitled to the benefit of all favorable inferences that

> may be drawn from the facts. The same standards should be applied by an appellate court reviewing a summary judgment order.

Id. at 1339-40 (citations omitted). Thus, as in *Churchey*, we must determine whether the defendants met their burden of proving that there are no relevant issues of material fact and that Public Service and Richards are entitled to judgment as a matter of law on Thompson's defamation claims.

To prove a claim for defamation against an employer a plaintiff must show that the employer published a false statement of defamatory fact. *Id.* at 1341. If the communication is protected by a "qualified privilege," then the plaintiff may recover only if he proves that the defendant "publishe[d] the material with malice, that is, knowing the matter to be false, or act[ed] with reckless disregard as to its veracity." *Id.* at 1346 (citations omitted). According to *Restatement (Second) of Torts*, "[r]eckless disregard exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of the statement." *Restatement (Second) of Torts* § 600 comment b (1977). Here, the trial court properly ruled that Richards' statements were protected by a qualified privilege.

In support of their motion for summary judgment, the defendants filed with the trial court a number of affidavits as well as excerpts from depositions. Defendant Richards' affidavit described his view of the circumstances surrounding the alleged incident of sexual harassment stating:

> I suspended Plaintiff for his conduct on November, 17, 1983 because, as I was told, he had been loitering around the State Administrative Offices, he had been copying the telephone numbers and names of the State female employees from the desk name plates, and he had been interrupting the female employees

> with personal questions concerning their Christmas parties and asking for their telephone numbers. I believe this unwanted attention by the Plaintiff toward the female employees constituted sexual harassment.

Richards also stated his basis for charging the defendant with falsification of a time card, stating:

> I reprimanded Plaintiff for his conduct in June 1984 when he asserted on his time card that he was on paid sick leave for June 5, 1984 when in fact he had not procured the required doctor's authorization to be authorized sick leave.

Finally, Richards stated:

> At the time, I disciplined Plaintiff for sexual harassment and falsification of his time card I believed that he had committed those acts and still so believe. I held no ill will toward Plaintiff before, during or as a result of the discipline I imposed upon him.

Thompson filed an affidavit in which he denied both the allegations of sexual harassment and falsification of the time card and presented a detailed version of the facts that was substantially different from Richards' version of the two incidents. Thompson also alleged in his affidavit that the charges "were part of an ongoing series of incidents and conduct on the part of Richards which clearly showed to me that he had malicious motives with regard to me."

In addition, Vic Cook, the supervisor who phoned Richards to complain about Thompson's conduct toward the state employees, never complained that Thompson's conduct constituted sexual harassment. Cook's letter to Richards described Thompson as a "nuisance." Richards testified in his deposition that Cook *implied* that Thompson had sexually harassed female employees, but Richards acknowledged in his deposition that he was unable to

substantiate his charge of sexual harassment by reports from the alleged victims, although he made numerous requests for such substantiating reports. Finally, with respect to the charge of falsifying his time card, Thompson alleged in his affidavit that Richards' superior, Kenny Barnett, labelled the charge "ridiculous" and marked the reprimand "void."

Giving Thompson the benefit of all favorable inferences that may be drawn from these facts, as we are compelled to do, we conclude that Thompson has demonstrated that a genuine issue of fact exists with respect to whether Richards knew of the falsity of his statements or acted with reckless disregard as to the falsity of his statements contained in the letters in question.

Accordingly, we reject the court of appeals' analysis and we reverse its judgment upholding the trial court's order granting summary judgment for the defendants. The court of appeals is directed to remand the case for trial on Thompson's defamation claims.

JUSTICE VOLLACK does not participate.

APPENDIX B

COLORADO COURT OF APPEALS

No. 87CA0777

WILLARD A. THOMPSON,
Plaintiff-Appellant,
v.
PUBLIC SERVICE COMPANY OF COLORADO, a corporation; and R. M. RICHARDS, a/k/a MARK RICHARDS,
Defendants-Appellees.

Appeal from the District Court of the City and County of Denver

No. 84CV12173

HONORABLE DANIEL B. SPARR, Judge

[Opinion filed and judgment entered on the 15th day of December, 1988]

JUDGMENT AFFIRMED

DIVISION III
Opinion by JUDGE CRISWELL
VAN CISE and STERNBERG, JJ., concur

JOSEPH P. GENCHI, P.C.
JOSEPH P. GENCHI
Estes Park, Colorado
Attorneys for Plaintiff-Appellant

KELLY, STANSFIELD & O'DONNELL
KEVIN W. HECHT
DAVID W. KERBER
Denver, Colorado
Attorneys for Defendants-Appellees

Plaintiff, Willard A. Thompson, appeals the summary judgment that dismissed his libel action against defendants, Public Service Company (PSC) and R. M. Richards, a PSC supervisor. The trial court entered the judgment because it concluded that defendants possessed a qualified privilege to publish the statements involved and that the undisputed evidence demonstrated that that privilege had not been abused. In the circumstances portrayed by this record, we conclude that the federal labor policy, as reflected in the applicable federal statutes, requires the recognition of an absolute privilege for defendants' statements. Thus, we affirm.

Plaintiff was employed by PSC in a collective bargaining unit of employees whose exclusive bargaining representative for purposes of the National Labor Relations Act, 29 U.S.C. § 151, et seq. (1982), was Local Union No. 111 of the International Brotherhood of Electrical Workers (IBEW). PSC and IBEW were parties to a collective bargaining agreement that governed the wages, hours of work, and other terms and conditions of employment for the employees within the bargaining unit, including plaintiff.

This agreement recognized PSC's right "to suspend, to discharge, or to discipline [employees] for proper cause," subject, however, to a disciplined employee's right to adjust any grievance relating to any discipline in accordance with the procedures described in the agreement. Under the agreement, the initial means for resolution of a grievance was to be by informal discussions between an employee and his immediate supervisor. If the dispute was not resolved in that manner, then a formal four-step procedure was followed. That procedure began with discussions between IBEW representatives and lower management representatives, progressed through discussions between higher level representatives, and culminated, if necessary, in binding arbitration.

In November 1983, plaintiff was sent to do maintenance work upon boilers that were located in the basement of a building. While waiting for other PSC employees to arrive at the building, plaintiff left the basement area, went to another floor, and attempted to speak with several female clerical employees who worked for another employer. This activity resulted in a supervisor of the clerical employees telephoning plaintiff's supervisor and complaining about plaintiff's activities. Plaintiff returned to PSC's premises and attended a meeting with his supervisor and an IBEW representative to discuss what had occurred.

After this conference, plaintiff was given a written notice that he was to be suspended from his job without pay for five days. This notice reviewed previous disciplinary actions taken against plaintiff for other incidents and asserted that the present suspension was being imposed because of his "creating a nuisance for customer employees and *sexual harassment* and/or unwanted contact of customer employees." (emphasis supplied) A copy of this notice was provided to IBEW, to plaintiff's second and third level supervisors, and to PSC's labor relations department, and a copy was placed in plaintiffs' personnel file. There was no competent evidence submitted to the trial court that PSC furnished any other person with a copy of this notice.

Plaintiff invoked the contract's formal grievance procedures to protest this suspension and, at the second step, the matter was considered and resolved by a joint union-management committee, consisting of three PSC representatives and three IBEW representatives. Both plaintiff and his immediate supervisor were present as witnesses and a member of PSC's labor relations staff was also present as an observer. After considering the matter, it was agreed that plaintiff's grievance would be finally settled by reducing his suspension from 5 days to 2 days and by removing the word "sexual" from the written

notice previously issued to him. In return, plaintiff agreed that he would receive counseling through one of PSC's internal employee assistance programs.

Approximately eight months later, plaintiff was absent from work because of an illness. PSC's working rules required such an absent employee to present a physician's statement attesting to his illness upon his return to work. Plaintiff failed to provide such a statement, and he marked his time card for the period of his absence as "sick leave," which would have resulted in his being paid during his absence.

As a result of this incident, a "written reprimand" was issued to plaintiff in a form similar to his previous notice of suspension. This document noted that plaintiff had failed to comply with PSC's requirement for a doctor's statement on previous occasions and that he had been told that a future infraction of that rule would result in his failure to be paid for his absence. It concluded that, under these circumstances, plaintiff's marking of his time card in the manner in which he did constituted a "falsification" of that time card. A copy of this written reprimand was provided to the same parties as were provided copies of the previous notice of suspension. Again, there was no evidence presented that anyone else received a copy of this reprimand.

It is not clear whether plaintiff invoked the contract's formal grievance procedures to protest this written reprimand or whether he undertook to adjust his objection to it in an informal matter. In any event, he contacted his third level supervisor, who would have been involved in any formal grievance proceeding, and that supervisor directed that an amended letter of reprimand be issued to plaintiff to remove any reference to a falsification of his time card.

Plaintiff's complaint in libel contained two claims, based upon these two written notices. The trial court

concluded, however, that the two statements upon which plaintiff relied to establish actionable defamation were each subject to the qualified privilege that attaches to job-related statements made by an employer about an employee. *See Dominguez v. Babcock*, 727 P.2d 362 (Colo. 1986); *Price v. Conoco, Inc.*, 748 P.2d 349 (Colo. App. 1987). It also concluded that the undisputed facts demonstrated that the statements were not made with a knowledge of their falsity or with a reckless disregard thereof, *see Dominguez v. Babcock, supra*, and that they were not published to persons outside the interested group. *See Patane v. Broadmoor Hotel, Inc.*, 708 P.2d 473 (Colo. App. 1985).

Plaintiff argues that his evidence showed that his supervisor made each statement without conducting a sufficient investigation, so that a reasonable inference could be drawn that that supervisor had acted with a reckless disregard of the truth of those statements, thereby rendering summary judgment inappropirmate. However, because we conclude that the statements were subject to an absolute privilege and that the evidence demonstrates that that privilege was not abused, we affirm the trial court's judgment without passing upon the question of the existence of malice under *Dominguez v. Babcock, supra.*

When Congress adopted § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1982), it granted jurisdiction to the federal courts to adjudicate claimed violations of collective bargaining agreements. While perhaps not evident on its face, § 301 contains a mandate to the federal courts to fashion a body of federal law applicable to union contracts. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). Moreover, the state courts must apply the tenets of the substantive federal law developed under § 301 to the exclusion of any inconsistent state law that might otherwise be applicable. *Teamsters Local No. 174*

v. Lucas Flour Co., 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962); *Digby v. Denver*, 156 Colo. 260, 398 P.2d 30 (1965).

One of the basic principles of the federal law relating to union contracts is that, where such a contract contains a provision that calls for the reference of disputes arising under its terms to binding arbitration, courts lack jurisdiction to intervene in such disputes. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960). Thus, where the parties have committed disputes relating to the interpretation of a bargaining agreement to the jurisdiction of an arbitrator, no state may authorize the assertion of a state law claim, whether grounded in contract or in tort, that would require an interpretation or application of the terms of that agreement by a tribunal other than the arbitrator. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985).

If an alleged libel takes the form of a statement by an employer to justify the imposition of discipline upon an employee under a union contract, and the question of the propriety of that discipline may be made the subject of binding contractual grievance and arbitration procedures, those procedures must necessarily result in the consideration and resolution of the issues of the truth of the statement made and the propriety under the contract of the discipline imposed. Further, the underlying purposes of such grievance and arbitration procedures require that the parties to those procedures be encouraged to engage in a full, free, and frank discussion of their positions. *See General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966).

For these and similar reasons, it has been held that the national labor policy requires the recognition of an

absolute privilege for any statements that are germane to the subject made to persons involved in contractual grievance proceedings under a collective bargaining agreement. And, this privilege extends both to those statements made during conferences or hearings conducted pursuant to those proceedings, *General Motors Corp. v. Mendicki, supra*, and to written notices of discipline which "trigger" the initation of such proceedings. *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981). *Accord Surrency v. Harbison*, 489 So. 2d 1097 (Ala. 1986); *Aubuschon v. Internaitonal Mill Service*, 167 Ill. App. 3d 965, 522 N.E.2d 898 (1988); *Louisville & Nashville Ry. Co. v. Marshall*, 586 S.W.2d 274 (Ky. App. 1979); *Rougeau v. Firestone Tire & Rubber Co.*, 274 So. 2d 454 (La. App. 1973); *Fulghum v. United Parcel Service*, 424 Mich. 89, 378 N.W.2d 472 (1985); *Turner v. Gateway Transportation Co.*, 569 S.W.2d 358 (Mo. App. 1978); *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985) (equating statements in grievance proceedings to statements in judicial proceedings); *Neece v. Kantu*, 84 N.M. 700, 507 P.2d 447, 60 A.L.R.3d 1030 (N.M. App. 1973); *Bailey v. Sams*, 24 Ohio App. 3d 137, 493 N.E.2d 966 (1985); *Agriss v. Roadway Express Co.*, 483 A.2d 456 (Pa. Super. 1984). *Contra Tellez v. Pacific Gas & Electric Co.*, 817 F.2d 536 (9th Cir. 1987) (if contract does not require notice of discipline to be placed in writing, only qualified privilege recognized), *cert. denied*, —— U.S. ——, 108 S.Ct. 251, 98 L.Ed.2d 209 (1987); *Ezekiel v. Jones Motor Co.*, 374 Mass. 382, 372 N.E.2d 1281 (1978) (qualified privilege); *Bird v. Meadow Gold Products Corp.*, 60 Misc. 2d 212, 302 N.Y.S.2d 701 (1969) (qualified privilege).

In this case, the written notice, in each instance, described the nature of the discipline being imposed upon plaintiff, set forth the employer's reasons which it considered to be the "proper cause" for the discipline, and gave the effective date of the employer's action. While

there is no evidence that the contract *required* such a written notification, the contract also does not prohibit the notice of discipline from being placed in written form. Indeed, since the contract requires the employer to demonstrate "proper cause" for any discipline imposed and sets a time limit for the employee to invoke the grievance procedure, the issuance by PSC of a written notice, in lieu of reliance upon an oral statement of a supervisor, lessens the possibility of misunderstanding among the parties and increases the degree of industrial due process that a disciplined employee is accorded. In light of the purposes to be served by a recognition of an absolute privilege for such statements, the fact that the pertinent contract does not require a written statement by the employer is, in our view, of little relevance. But *compare Hasten v. Phillips Petroleum Co., supra, with Tellez v. Pacific Gas & Electric Co., supra.*

In addition, the undisputed evidence also demonstrates that PSC did not abuse its absolute privilege. In *Patane v. Broadmoor Hotel, Inc., supra*, it was held that an employer had a qualified privilege to publish to all co-employees the reasons for the termination of an employee, since all employees shared a common interest in information relating to the "turnover or status of personnel." *Accord Denver Public Warehouse Co. v. Holloway*, 34 Colo. 432, 83 P. 131 (1905). *See* Restatement of Torts (Second) § 596 (1979).

However, the absolute privilege recognized here exists among a substantially smaller group. In order to preserve this privilege, the statement's publication must be limited to those persons who have a direct interest in the subject of the dispute or in the labor-management functions involved in the contractual procedures. *See Hasten v. Phillips Petroleum Co., supra.*

Here, PSC limited the publication of the notices to plaintiff and his collective bargaining agent, its labor

relations staff, and supervisors who would become involved in the grievance proceedings if plaintiff elected to invoke those procedures. Each of the persons receiving the notices had a legitimate job-related interest in the dispute or in any future grievance proceedings that might be scheduled. Thus, the absolute privilege that the national labor policy requires to be recognized was not abused here.

Judgment affirmed.

JUDGE VAN CISE and JUDGE STERNBERG concur.

APPENDIX C

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. 84 CV 12173, Courtroom 2

WILLARD A. THOMPSON,
Plaintiff,

v.

PUBLIC SERVICE COMPANY OF COLORADO, *et al.*,
Defendants.

ORDER

THIS MATTER comes on on Defendants' Motion for Summary Judgment. The Court has reviewed the briefs and heard the arguments of counsel and now makes the following findings of fact, conclusions of law and order.

The Plaintiff's complaint alleges two claims for relief. These claims are based upon alleged libels occuring while the Plaintiff was employed by the Defendant. The statements occurred in the context of disciplinary actions against the Plaintiff.

The Defendants' Motion for Summary Judgment states that the statements made during the grievance and disciplinary proceeding are absolutely privileged under federal law and qualifiedly privileged under state law.

The Court does not need to address the issues raised under federal law since the qualified privilege that exists under Colorado State law applies.

The Plaintiff argues that this privilege does not apply since the published statements were actuated by actual malice. A review of the exhibits and deposition excerpts shows no genuine issue of fact concerning the question of malice. The statements made by the Defendant were not made with actual malice. See *Abrahamsen v. Mountain States Telephone & Telegraph*, 177 Colo. 422, 494 P.2d 1287 (1972).

Accordingly, the Defendants' Motion for Summary Judgment is granted.

DATED April 14, 1987

BY THE COURT

/s/ Daniel B. Sparr
DANIEL B. SPARR
District Court Judge

cc: JOSEPH P. GENCHI, ESQ.
DAVID W. KERBER, ESQ.

APPENDIX D

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. 84 CV 12173, Courtroom 2

WILLARD A. THOMPSON,

Plaintiff,

v.

PUBLIC SERVICE COMPANY OF COLORADO,
a Colorado corporation, and
R. M. RICHARDS a/k/a R. MARK RICHARDS,

Defendants.

MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS PUBLIC SERVICE COMPANY OF COLORADO AND R. M. RICHARDS A/K/A MARK RICHARDS

Defendants, Public Service Company of Colorado and Mark Richards hereby move this Court to grant summary judgment pursuant to Rule 56(b), Colorado Rules of Civil Procedure, upon the following grounds:

1. Plaintiff's claims for relief which are based upon alleged libel occurring in an employer/employee context where the employee is covered by a collective bargaining agreement are preempted by federal labor law. Where a state cause of action is preempted by federal labor laws, it is a challenge to the Court's subject matter jurisdiction and can be raised at any time. *International Longshoremen's Assoc. v. Davis*, 476 U.S. ——; 90 L.Ed.2d 389 (1986).

2. There is no genuine issue as to any material fact and Defendants are entitled to a judgment as a matter of law.

3. The Court is referred to Defendants' Brief in Support of their Motion for Summary Judgment, affidavits and exhibits attached thereto which is incorporated herein by reference.

Respectfully submitted,

KELLY, STANSFIELD & O'DONNELL

By: /s/ David W. Kerber
DAVID W. KERBER, #13888
550 15th Street, #900
Denver, Colorado 80202
(303) 825-3534
Attorneys for Defendants

DATED: October 14, 1986

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of October, 1986, a true and correct copy of the foregoing MOTION FOR SUMMARY JUDGMENT BY DEFENDANT was placed in the U.S. mail, postage prepaid, and addressed to:

JOSEPH P. GENCHI, ESQ.
JOSEPH P. GENCHI, P.C.
302 E. Elkhorn Ave.
P.O. Box 1990
Estes Park, Colorado 80517

/s/ Karen L. Harr

Supreme Court, U.S.
FILED
MAR 25 1991
OFFICE OF THE CLERK

ORIGINAL

No. 90-1173

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,

Petitioners,

v.

WILLARD A. THOMPSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

JOSEPH P. GENCHI
302 East Elkhorn Avenue
P. O. Box 1990
Estes Park, Colorado 80517
Telephone: (303) 586-2496

Attorney for Respondent,
Willard A. Thompson

32pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	11
ARGUMENT	12
A. The tests for determining whether state law tort claims are preempted by Sec. 301 is whether a state court has to interpret a collective bargaining agreement in order to resolve the tort issue, and has been settled by Lingle v. Norge Division of Magic Chef, Inc.	12
B. The petitioners have demonstrated no persuasive reasons for creating an exception to the Lingle rule in defamation cases.	15
C. Sec. 301 does not require an absolute privilege be granted to defamatory statements made in the course of grievance proceedings, and even if the Court should decide that an absolute privilege does exist, the qualified privilege articulated by Colorado law is virtually indistinguishable from the standard approved by the Supreme court in a number of cases. . .	16
CONCLUSION	17

TABLE OF AUTHORITIES

CASES: Page

Abrahamsen v. Mountain States Tele. & Tele.,
177 Colo. 422, 494 P.2d 1287 (1972) 4

Churchy v. Adolph Coors Co.,
759 P.2d 1336 (Colo. 1988) 15

Clark v. Momence Packing Co.,
486 U.S. 1049 (1988) 14

Ezekial v. Jones Motor Co.,
372 N.E.2d 1281 (1978) 15

General Motors v. Mandecki,
367 F.2d 66 (10th Cir. 1966) 13-14

Hasten v. Phillips Petroleum Co.,
640 F.2d 274 (10th Cir. 1981) 12-13

Lingle v. Norge Division of Magic Chef, Inc.,
486 U.S. 399 (1988) 3,11,12,14,16,17,18

Linn v. United Plant Guard Workers Local 114,
383 U.S. 53 (1966) 3,17

New York Times Co. v. Sullivan,
376 U.S. 257 (1964) 16

Old Dominion Branch No. 496, National Association of
Letter Carriers v. Austin,
418 U.S. 264 (1974) 3,17

San Diego Building Trades Council v. Garman,
359 U.S. 236 (1966) 12

United Automobile Workers v. Russell,
356 U.S. 634 (1958) 12

CONSTITUTIONAL PROVISIONS AND
STATUTES:

28 U.S.C. § 185 (Sec. 301) 3,11,12,14,15,16,17

MISCELLANEOUS:

Restatement (Second) of Torts, § 600 (1977) 17

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-1173

PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,

Petitioners,

v.

WILLARD A. THOMPSON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE SUPREME COURT OF COLORADO

The respondent, Willard A. Thompson, respectfully prays that the Petition for a Writ of Certiorari filed herein by petitioner, Public Service Company of Colorado and R. M. Richards, to review the judgment and opinion of the Supreme Court of Colorado entered in this proceeding on October 22, 1990, be denied.

STATEMENT OF THE CASE

It is crucial to direct the Court's attention to the failure of the petitioners to put the entire collective bargaining agreement into evidence. The Colorado Court of Appeals pointed out that there is no evidence that the agreement required a written notification of disciplinary action. It went on to say that the contract did not prohibit it either (25(a) to 26(a). This statement was made with only selected portions of the agreement before it which had been attached to the motion for summary judgment filed in the trial court.

Other references are made in the opinions of the Colorado Court of Appeals and the Colorado Supreme Court. The only designation of the record on appeal was that of the respondent, and he did not designate the collective bargaining agreement since the burden was on the petitioners to expand the record in the trial court if they so chose. In fact, respondent's counsel has never seen a copy of the entire agreement. The Colorado Supreme Court explicitly pointed out that since this action was disposed of by summary judgment, it must reconstruct the factual background from the parties' pleadings, affidavits and depositions. In fact, only limited portions of the two depositions taken in this action, that of respondent and petitioner Richards, were attached to the petitioners' motion for summary judgment. For reasons known only to petitioners the collective bargaining agreement was not presented *in toto* to either of the lower courts, and clearly cannot be presented here. Therefore, the Court is somewhat at a handicap which is not the ideal way to present a case for certiorari consideration.

The failure is being brought to the attention of the Court since petitioners refer to it freely as though the lower courts had considered the precise language provisions of the entire agreement. See petition, p. 4, fn. 2. But, in view of Lingle v. Norge Division of Magic Chef, Inc, 486 U.S. 399 (1988), and petitioners' concession that their case does not depend upon interpretation of the agreement, but upon other theories, this omission may be irrelevant.

The petitioners' statement of the case is wanting since it does not refer to or develop in any manner the intolerable and outrageous set of facts that underlies the respondent's case against them. More details are necessary particularly since the Colorado Supreme Court expresses its disagreement that 29 U.S.C. § 185 (1982), referred to as § 301, supports the recognition of an unqualified privilege under federal law, and also points out that the qualified privilege articulated by the Colorado court was "virtually indistinguishable" from the standard approved by this Court.[1]

Respondent, a former employee of the corporate petitioner (Company) claims that on December 6, 1983, the Company and petitioner Richards, a superintendent of operations for the Company, published, circulated, and acted upon an inter-department memorandum which charged respondent with sexual harassment. The charge was reported to various persons in the Company, and placed in plaintiff's personnel file. It was subsequently published to others outside the Company. Respondent

---

1- Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974); Linn v. United Plant Guard Workers Local 114, 383 U.S. 53 (1966).

claims the statements were false and defamatory, and were published maliciously, and with full knowledge of their falsity by Richards, acting for and on behalf of the Company. Damages are claimed under the doctrine of libel per se.

In a second claim for relief, respondent claims that the Company, again through Richards, published, circulated, and acted upon his inter-department memorandum charging respondent with falsification of a time card, which would in effect be theft from the Company by fraud. It was charged the statement was false and defamatory, was published maliciously, and with full knowledge of its falsity. Plaintiff also claims damages charging that the statement was libelous per se.

Petitioners interposed a number of defenses, including qualified privilege. They relied on Abrahamsen v. Mountain States Tele. & Tele., 177 Colo. 422, 494 P.2d 1287 (1972), a leading Colorado case.

After the depositions of respondent and Richards were taken, petitioners filed a motion for summary judgment. With regard to the trial court, only Abrahamsen assumes importance since it relied solely on that case as the basis for its decision that a review of the exhibits and deposition excerpts showed no genuine issues of fact concerning the question of malice. It concluded that the statements made by Richards were not made with actual malice as required by Colorado law in order to overcome the qualified privilege, and granted the motion for summary judgment.

The only evidence in the record are excerpts from two depositions, the affidavit of respondent, various exhibits attached to the

petitioners' motion for summary judgment and the response thereto, Richards' affidavit, and brief affidavits of several of respondent's superiors.

Complementing the complaint, respondent filed a lengthy affidavit in opposition to petitioners' motion for summary judgment which laid out these facts: On November 17, 1983, respondent was an employee of the Company holding a position of operator, and had been employed by the Company for 22 years. On that date he and two fellow employees were sent to the State Steam Plant in Denver. They were to do maintenance work on two boilers in the basement of the building. The other two employees left to pick up a load of salt.

Respondent, with nothing to do until they returned, went upstairs where he noted a bulletin board. He examined it and saw some mention of a Christmas party for the state employees. He became interested because he was an organist and pianist, and played at various functions such as weddings and parties, including Company parties. Sometimes he charged a fee, other times he donated his services.

He made what he called an innocent effort to ascertain the person in charge of the party. He spoke to a Ms. Mattox who appeared to be in charge of the employees on that floor. He noted that no one appeared friendly, and that for some reason she and four other women who were in her immediate vicinity seemed to be up tight about something. Receiving no satisfaction after trying to talk to some of the people, he went back downstairs. He never met or talked with a Mr. Cook who purportedly made some complaint about him to Richards.

Later, a fellow employee came to the building and told respondent that Richards wanted him to return immediately to the Denver plant.

Respondent was escorted to the office of Richards who made no particular charge, but told respondent that everything was going to be all right, that Richards would investigate, and respondent was told to relax. Respondent didn't know what he was talking about. It appeared that he had offended someone by his presence. After the meeting he called Cook and told him that if he had offended anybody, he was apologizing.

Respondent was not advised of the seriousness of the charge being made by Richards until around December 6, 1983, when he was called to Richards' office and handed a letter of Disciplinary Suspension charging respondent with a panopoly of charges including poor work performance, reference to an earlier incident when Richards had complained about improper documentation of lost time, another directive wherein he had charged respondent with negligence and incompetence, and to these charges Richards added "sexual harassment" involving customer employees. No details were given. Respondent was bewildered because he could not believe such a charge could be leveled against him.

The other charges, including that alleged in respondent's second claim for relief involving a time card, were part of an ongoing series of incidents and conduct on the part of Richards which clearly demonstrated to respondent that he had malicious motives with regard to him, and was hoping to get rid of him. Not only did Richards file four unwarranted charges against respondent, but he did other things which the respondent considered vicious and demeaning.

The respondent was 58 years of age at the time, and a veteran employee. Richards was over 20 years younger, and in July, 1983, was appointed supervisor over respondent and others. From the very beginning, it became difficult for him and other older employees to function because of Richards' policies and overbearing attitude. In this instance, he gave respondent no chance to explain even after he handed him a letter with a 5-day suspension. Richards was never clear with regard to what respondent purportedly had done.

As soon as Richards was appointed respondent's supervisor, he gave him and a few other older men jobs which are not usually done by operators, particularly those who are no longer young, such as janitor and cleaning work, painting, crawling into hot steam holes, climbing into tanks through tiny manholes, and working with sand blasters. These jobs were difficult for respondent because of his age, but Richards ordered him to do such work. Respondent stated that Richards made it clear that respondent was in trouble as soon as he became respondent's boss. He told respondent and others that he was starting a new "regime." For example, one day he ordered respondent to sand the floor of his office. As he was sitting in his chair, respondent was working on his knees on the floor near Richards' feet. Richards leaned over and said, "One of these days I'll have enough on you to get rid of you." Respondent described Richards in general as being nasty, arrogant, and spiteful. He never spoke decently to respondent who always feared for his job.

On another occasion Richards told respondent that what had happened to a manager can happen to him. The manager had been

relieved of his duties, "pigeon-holed," and died shortly thereafter. Respondent was more fearful for his job than ever, and he really thought he had lost it when the false charge of sexual harassment was made on top of the other earlier charges.

With regard to the charge of falsifying a time card, this was false and based on the opinion of Richards that one must have a doctor's certificate even if you did not go to a doctor, and were off for only one day. One superior labeled the charge of falsifying a time card as "ridiculous." It was later marked "void" by another superior.

There was publication outside the Company by a writer for the Company newspaper. Publication was made to the editor of a religious newspaper called "Servant" who had called the Company newspaper office making inquiry about writing a laudatory story about the work of respondent and his wife with the Denver homeless and the so-called "street people." The editor was told by the Company newspaper reporter that he would not want to write anything about "this man" because he was up for sexual harassment charges. The reporter for the "Servant" then declined to write the article. There was also a loss of donations by a wealthy Denver philanthropist when the facts of the charges were made known to her and became common knowledge throughout the Company.

All the charges did not go to a grievance procedure except sexual harassment. This charge was later dropped. Respondent retired under an early incentive program although he did not wish to do so. He retired since he was afraid of losing his job because of Richards,

and the defamation action respondent had filed against him.

Respondent also charged that two supervisors were told by Richards to lean on him, and to get something on him and others. Both supervisors, named in respondent's affidavit, one retired and one still employed, advised respondent of this fact, and would be called to testify.

During the course of Richards' deposition, he was asked if he would like to see respondent leave the Company. His answer: "I don't think that would hurt anything." In his affidavit filed with petitioners' motion for summary judgment, he claimed that he had respondent removed from the State Steam Plant as a result of a complaint from Mr. Vic Cook, an employee of the State of Colorado. He stated that he suspended plaintiff for his conduct on November 17, 1983, because as he was told, respondent had been loitering around the state administrative office, had been copying the telephone numbers and names of the state female employees from the desk name plates, had been interrupting the female employees with personal questions concerning their Christmas parties, and has asked for their telephone numbers. Richards charged that this is sexual harassment.

According to Richards, Mr. Cook had said that Mr. Thompson had been loitering upstairs where there was a secretarial pool and had been asking questions and generally bothering the secretarial pool people. However, Mr. Cook did not state what the questions were. He said nothing specific. Cook could not mention anything specific.

He stated again that respondent was just generally in the office and walking around through the desk areas.

No one questioned respondent after he was taken to the Denver Steam Plant.

Before Richards interviewed respondent, he had no further occasion to talk to Mr. Cook, nor did he speak to any of the girls in the secretarial pool. The only knowledge he had was that given to him by Mr. Cook, which he then elaborated upon.

He interviewed the respondent at the steam plant and told him about the telephone conversation. Respondent said that he had been "up there," that he had been asking about playing at a Christmas party, and had been walking around in the secretarial pool talking to various employees. That's all he said. Richards spoke to the other employees who were at the State Plant that day, but they could not provide any information. He went to the State Plant where the bulletin board was located and looked at it because respondent told him he wanted to play for the Christmas party. He considered it unusual that respondent had looked at the bulletin board. He considered that loitering. He did not admit that respondent had nothing to do until his fellow employees returned with the salt.

Richards conceded that he did not talk face to face with Mr. Cook with regard to the incident. He talked to a girl about it, but none of the other girls would talk to him. He had heard that there had been obscene phone calls that had upset these girls. He is not aware of anyone charging respondent with making such calls.

Mr. Cook told Richards that he would forward a letter of

complaint from the female employees outlining their complaints, but this was never done. Richards had made three or four calls to Cook. As far as the Company's complaints are concerned, they were what Richards claimed Cook had told them on the telephone, and what a girl had told him in her office. The complaint was not and could not be proved.

The language in the complaint concerning sexual harassment was solely that of Richards, and his alone. Respondent always maintained that he had done nothing wrong.

Copies of the memo went to the union steward, respondent, several superiors, and labor relations.

SUMMARY OF ARGUMENT

A. The tests for determining whether state law tort claims are preempted by Sec. 301 is whether a state court has to interpret a collective bargaining agreement in order to resolve the tort issue, and has been settled by Lingle v. Norge Division of Magic Chef, Inc., supra.

B. The petitioners have demonstrated no persuasive reasons for creating an exception to the Lingle rule in defamation cases.

C. Sec. 301 does not require an absolute privilege be granted to defamatory statements made in the course of grievance proceedings, and even if the Court should decide that an absolute privilege does exist, the qualified privilege articulated by Colorado law is virtually indistinguishable from the standard approved by the Supreme Court in a number of cases.

ARGUMENT

A. The tests for determining whether state law tort claims are preempted by Sec. 301 is whether a state court has to interpret a collective bargaining agreement in order to resolve the tort issue, and has been settled by Lingle v. Norge Division of Magic Chef, Inc., supra.

The view of the petitioners regarding an employee's right to be free from defamatory allusions within a labor relations context is hardly beneficent, and demonstrates a want of concern or understanding of interests so deeply rooted in local feelings and responsibility that in the absence of compelling congressional intention, it cannot be inferred that Congress has deprived the states of the power to act. San Diego Building Trades Council v. Garman, 359 U.S. 236 (1966). E.g. United Automobile Workers v. Russell, 356 U.S. 634 (1958). The harshness of the petitioners' views is aptly demonstrated in their interpretation of Hasten v. Phillips Petroleum Co., 640 F.2d 274 (10th Cir. 1981), when petitioners stated:

> The Hasten case requires judgment for the defendants even if the libelous statements were false, untrue, and malicious.
> (Emphasis supplied.)
> (Tr.Ct. Reply Br. p.4.)

This view would dismantle the law of defamation, be it state or federal.

Nevertheless, the Colorado Supreme Court rejected Hasten and similar cases and held that Lingle has settled the issue in favor of state law remedies as being independent of collective bargaining agreements when an interpretation of the agreement is not necessary

for the application of state law principles. In fact, the Colorado court adheres closely to Lingle, particularly when it stated that this case presented a stronger case for permitting state action than Lingle. The Colorado court said:

> Moreoever, this case presents a stronger case for permitting the state law action than Lingle. In Lingle the grievance proceeding and the wrongful discharge action decided, arguably, precisely the same issue: whether the termination of the employee was proper. In constrast, a grievance proceeding like the one involved in this case does not necessarily decide the truth of the matters asserted in a letter of discipline, but in many instances may focus narrowly on the appropriateness of the particular discipline imposed.
> (Pet. 12A)

There was no specific finding in this action as to the truth or falsity of the accusations made in the Company's notices of discipline. The Colorado court balked at the premise that a grievance is the sole remedy of an employee defamed by his employer. The restrictive grievance procedures would not remedy damage to his reputation and do not provide any mechanism for vindicating an employee's interest in protecting his good name from unjustified and knowingly false accusations of serious misconduct. The petitioners' views of an employee's good name, and his right to an opportunity to vindicate, are seriously deficient.

Many cases are cited in the petition to show a conflict in the circuits and the state courts which petitioners claim require intervention by the Court.

It is difficult to imagine a more clear-cut case than Lingle. The cases cited by petitioners such as Hasten and General Motors v.

Mandecki, 367 F.2d 66 (10th Cir. 1966), either predate Lingle, or as in Mandecki, for example, it is not clear whether the unqualified privilege was under state or federal law.

The state cases relied upon by the petitioners have no relevance here. The state courts have looked at the qualified privilege, the unqualified privilege, and no privilege at all principles in defamatory cases in different ways, which is how our system functions. But, the same courts will view torts, wrongful discharge, negligence, extreme and outrageous conduct, statutes of limitations, intrinsic fraud as opposed to extrinsic fraud, false imprisonment, police activities, warranties, statutes of fraud, res ipsa loquitur, common-law marriages, ad infinitum, in innumerable ways and with incalculable variance. There is no way this Court can track all of the state courts and try, in effect, to codify the law when a federal question is involved, nor does there appear to be any inclination on the part of the Court to have it otherwise.

Lingle has been followed by the Court in Clark v. Momence Packing Co., 486 U.S. 1049 (1988), where certiorari had been granted, the judgment vacated, and the case remanded in light of Lingle. In a retaliatory discharge case, the Court of Appeals for the Tenth Circuit also followed Lingle in Marshall v. TRW, Inc., Reda Pump Division, 900 F.2d 1517 (10th Cir. 1990).

The Lingle decision settles any conflicts which had arisen under 301 regarding independent state action by a practical and easily followed solution which clearly applies to the instant case.

B. The petitioners have demonstrated no persuasive reasons for creating an exception to the Lingle rule in defamation cases.

Although there is no Congressional legislation specifically governing defamatory actions predicated upon statements made during a labor grievance proceeding not prohibiting a state court from regulating conduct in a manner consistent with national labor policies, the petitioners constantly raise the spectre of national labor policy being frustrated by permitting state courts' independent action on state tort claims even if they clearly fall within the Lingle reasoning. The petitioners fail to grasp that a great measure of protection is afforded management in defamation claims arising during the course of labor proceedings if the qualified privilege only is applied. In Colorado, for instance, the qualified privilege is a formidable weapon in the defense of defamation claims, and most of the time is insurmountable. As held in Churchy v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988), it was held that in the face of a defendant's qualified privilege, a plaintiff can recover on the defamation claim only by showing that the defendant published the material with malice, that is, knowing the matter to be false, or acted in reckless disregard of its truth or falsity. Such a burden of proof will hardly disrupt the federal labor law policy.

Addressing the doomsday approach, the Supreme Judicial Court of Massachusetts in Ezekial v. Jones Motor Co., 372 N.E.2d 1281 (1978), said:

> While the defendants do not clearly argue that this slander action in the State court is preempted by Federal labor legislation, they do urge that they

> should be immune from liability to avoid frustrating the policies expressed in this Federal labor legislation. Protecting its residents from slander has long been a concern of the Commonwealth. A grant of the conditional privilege provides a sufficient safeguard against the dampening of free discussion of the pertinent facts important to the peaceful adjustment of grievances.
> (p. 1285)

C. Sec. 301 does not require an absolute privilege be granted to defamatory statements made in the course of grievance proceedings, and even if the Court should decide that an absolute privilege does exist, the qualified privilege articulated by Colorado law is virtually indistinguishable from the standard approved by the Supreme Court in a number of cases.

As the lower court noted, no United States Supreme Court decision has held that an unqualified privilege is required under the rubric of national labor policy. In fact, the lower court suggests that the existing Supreme Court precedent suggests that a qualified privilege is the standard. Indeed, one cannot find any clues in Sec. 301, nor any Supreme Court decisions that go beyond "malice" in any context.

If the Court holds that Sec. 301 preempts state defamation law, it will have to redefine the privilege in order that it becomes a more potent defense than that of malice in the landmark case of New York Times Co. v. Sullivan, 376 U.S. 257 (1964), where proving malice, although difficult, is a keystone of the case. The petitioners, at times, seem to view absolute or unqualified privilege as shielding the most horrifying and egregious of defamations -- falsity in its most perverse and indefensible form. In other words--

"anything goes." The cases in Colorado are virtually indistinguishable from the standard of malice in Letter Carriers, supra, and Linn, supra. See Churchy, supra, and Dominquez v. Babcock, 727 P.2d 362, 366 (Colo. 1986).

Finally, the Colorado court approved this definition in Restatement (Second) of Torts, comment, b, Sec. 600 (1977):

> [r]eckless disregard exists when there is a high degree of awareness of probable falsity or serious doubt as to the truth of the statement.

While the word malice is not used, it is implicit in this definition, and in the Colorado decisions.

The law regarding independent state claims within the Sec. 301 context was decided by Lingle and echoes the methodology of most courts deciding to follow Sullivan. The rules are strict, and national labor policy notwithstanding, shall not be made so strict so as to be not only preemptive, the law of defamation may disappear, unless the Court deems it necessary to carve out a wide exception with regard to defamation and labor law. This, we are assured it will not do.

The Lingle doctrine is fair, understandable, and easily applied. Its application to defamation cases is also fair, understandable, and easily applied, and protects state policies deeply imbedded in state law and broad local interests. Lingle should not be disturbed in this case.

CONCLUSION

For the reasons set forth above, the respondent herein submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

Joseph P. Genchi
302 E. Elkhorn Ave.-P.O.Box 1990
Estes Park, Colorado 80517
Telephone: (303) 586-2496

Attorney for Respondent

SUPREME COURT OF THE UNITED STATES

PUBLIC SERVICE COMPANY OF COLORADO and R. M. RICHARDS,	)	
Petitioner,	)	
v.	)	No. 90-1173
WILLARD A. THOMPSON,	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the motion for leave to proceed in forma pauperis and affidavit in support thereof, and a copy of the brief in opposition, was deposited in the United States mail at the post office in Estes Park, Colorado, postage prepaid, first class, and addressed to the following:

David W. Kerber, Esq.
550 15th Street, Suite 900
Denver, Colorado 80202

on March 25, 1991.

Joseph D. Kendall

Supreme Court, U.S.
FILED
APR 17 1991
OFFICE OF THE CLERK

(3)

No. 90-1173

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,
Petitioners,

v.

WILLARD A. THOMPSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

---

PETITIONERS' REPLY BRIEF

DAVID W. KERBER *
KEVIN W. HECHT
KELLY, STANSFIELD & O'DONNELL
550 15th Street, Suite 900
Denver, Colorado 80202
(303) 825-3534

JAMES R. MCCOTTER
General Counsel
PUBLIC SERVICE COMPANY
OF COLORADO
550 15th Street, Suite 890
Denver, Colorado 80202
(303) 571-7161

Attorneys for Petitioners, Public Service Company of Colorado and R.M. Richards

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTRODUCTION	1
FACTUAL MISSTATEMENTS	1
ARGUMENT	3
CONCLUSION	5

TABLE OF AUTHORITIES

CASES:

Jones v. Rath Packing Co., 430 U.S. 519 (1977)	3
Lingle v. Norge Division, 486 U.S. 399 (1988)	4
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)	3

CONSTITUTIONAL PROVISIONS AND STATUTES:

29 U.S.C. § 171(a)	4
Federal Rule of Civil Procedure 56(e)	2
Colorado Rule of Civil Procedure 56(e)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1173

PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,
Petitioners,

v.

WILLARD A. THOMPSON,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

---

PETITIONERS' REPLY BRIEF

The Petitioners, Public Service Company of Colorado, and R. M. Richards submit this Reply Brief in support of their Petition for Writ of Certiorari.

INTRODUCTION

Pursuant to the terms set forth in Supreme Court Rule 15, Petitioners may address arguments first raised in the brief in opposition. The Respondent's opposition makes several significant misstatements of fact as well as of law which require a response.

FACTUAL MISSTATEMENTS

No matter what the facts of a particular case, the issue that calls for review and uniformity here is whether statements made in disciplinary letters by employers to their employees pursuant to a collective bargaining agree-

ment are absolutely privileged or are subject to only a qualified privilege. Respondent spends a substantial amount of his brief in opposition recounting his allegations (Respondent's Brief, pp. 3-11), many of which do not satisfy the requirement of personal knowledge necessary to oppose a Motion for Summary Judgment in accordance with Colorado Rule of Civil Procedure 56(e).[1]

Two factual allegations are so egregious as to require Petitioners to respond at this juncture. The first is the allegation that the disciplinary notice which charged Respondent with sexual harassment was published to persons outside the Company (Respondent's Brief, pp. 3, 8). This precise issue was squarely before the Colorado Court of Appeals, and it found:

> Here, PSC limited the publication of the notices to plaintiff and his collective bargaining agent, its labor relations staff, and supervisors who would become involved in the grievance proceedings if plaintiff elected to invoke those procedures . . . . [T]he absolute privilege that the national labor policy requires to be recognized was not abused here. (Petition for a Writ of Certiorari, Appendix B, pp. 26a-27a).

Neither the Colorado Supreme Court nor the Colorado Court of Appeals found that the disciplinary notices had been published beyond the proper group so as to amount to an abuse of the privilege. Respondent's allegations to the contrary do not constitute "competent evidence." (Petition for a Writ of Certiorari, Appendix B, p. 21a).

Second, Respondent's allegation that his retirement was involuntary (Respondent's Brief, pp. 8-9) is totally unsupported and irrelevant in any event. Plaintiff's Complaint was filed in 1984, and it contained no allegations relating to his retirement. Nor was this complaint ever amended. Further, as is evidenced by sworn testimony in the record below, Petitioner, R. M. Richards was the

---

[1] Colorado Rule of Civil Procedure 56(e) is virtually identical to Federal Rule of Civil Procedure 56(e).

Respondent's supervisor only through March, 1985. Therefore, when Respondent retired in 1986, Petitioner Richards was no longer his supervisor. Respondent voluntarily availed himself of a company-wide early retirement program.

ARGUMENT

Respondent asserts that "state cases relied upon by the Petitioners have no relevance here." (Respondent's Brief, p. 14). Respondent further states, "The state courts have looked at the qualified privilege, the unqualified privilege, and no privilege at all principles in defamatory cases in different ways, which is how our system functions." *Id.* The Respondent concludes, "There is no way this Court can track all of the state courts and try, in effect, *to codify the law when a federal question is involved. . . .*" *Id.* (Emphasis added). Such an assertion is directly contrary to basic principles of pre-emption and the pronouncements of this Court. *See, e.g., Jones v. Rath Packing Co.*, 430 U.S. 519, 543 (1977) (state law which prevents the accomplishment and execution of the full purposes and objectives of Congress is impermissible, and the state law must yield to the federal). It is exactly because a federal question concerning federal labor policy is involved that the Court must review this case to establish a uniform federal rule.

Contrary to the general contention of the Respondent, the Labor Management Relations Act authorizes federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). In fact, this Court stated that the authorization conferred by the Act includes the ability to order "specific performance of promises to arbitrate grievances . . ." *Textile Workers v. Lincoln Mills*, 353 U.S. at 451. Surely, the power of the federal courts to order specific performance of a promise to arbitrate grievances includes the power and authority

to determine the proper degree of protection for statements made in conjunction with those grievance and arbitration proceedings.

Congress has stated at 29 U.S.C. § 171(a) that the policy of the United States is that the settlement of issues between employers and employees can most satisfactorily be secured through the processes of conference and collective bargaining between employers and the representatives of the employees. Hence, pursuant to congressional direction and *Lincoln Mills*, federal labor policy necessarily requires a uniform federal application of an absolute privilege for statements made in disciplinary notices which are required pursuant to a collective bargaining agreement. Presently, the degree of privilege which is afforded to statements made in such disciplinary notices depends upon the jurisdiction in which the matter is at issue. This is an intolerable situation for employees, unions and employers, many of which operate on a national scope. A uniform standard is required.

The Respondent spends some time arguing that this case is not preempted pursuant to *Lingle v. Norge Division*, 486 U.S. 399 (1988), because no interpretation of the collective bargaining agreement is necessary. (Respondent's Brief, pp. 12-15). Petitioners do not contend that a detailed review of the collective bargaining agreement is required. (Petition for a Writ of Certiorari, pp. 9-10). However, the existence of the federal question involving what degree of privilege is afforded to disciplinary notices in order to preserve a free flow of information in the disciplinary and grievance process requires this Court to address this issue.

Also, the Respondent points out that the entire collective bargaining agreement was not made a part of the record below. As stated above, the particular terms of the collective bargaining agreement are not relevant for the determination of this issue of a uniform federal policy. What is important is that through the doctrine of

past practice, the collective bargaining agreement required that written disciplinary notices (the subject of the libel action here) be generated and provided to Respondent's collective bargaining agent, the Union. In that regard, there is ample evidence in the record below, provided by affidavit, of the requirements of the collective bargaining agreement. This has gone unchallenged by the Respondent.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Supreme Court of the State of Colorado.

Respectfully submitted,

DAVID W. KERBER *
KEVIN W. HECHT
KELLY, STANSFIELD & O'DONNELL
550 15th Street, Suite 900
Denver, Colorado 80202
(303) 825-3534

JAMES R. MCCOTTER
General Counsel
PUBLIC SERVICE COMPANY
OF COLORADO
550 15th Street, Suite 890
Denver, Colorado 80202
(303) 571-7161

Attorneys for Petitioners, Public Service Company of Colorado and R.M. Richards

* Counsel of Record

(4)

No. 90-1173

Supreme Court, U.S.
FILED
OCT 24 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

PUBLIC SERVICE COMPANY OF COLORADO, ET AL., PETITIONERS

v.

WILLARD A. THOMPSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

MAUREEN E. MAHONEY
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether an employer may be sued for defamation under state law for statements made in a disciplinary letter sent to an employee, where the court finds that the evidence does not establish that the disciplinary letter was required by the collective bargaining agreement.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Allis-Chalmers Corp. v. *Lueck*, 471 U.S. 202 (1985) 9

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) 6

Belknap, Inc. v. *Hale*, 463 U.S. 491 (1983) 17

Bill Johnson's Restaurants, Inc. v. *NLRB*, 461 U.S. 731 (1983) 14

Churchey v. *Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988) 4

Corbin v. *Washington Fire & Marine Ins. Co.*, 278 F. Supp. 393 (D.S.C. 1968) 16

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 17

Ezekiel v. *Jones Motor Co.*, 374 Mass. 382, 372 N.E.2d 1281 (1978) 9, 16

Franchise Tax Bd. v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) 10

Fulghum v. *United Parcel Service, Inc.*, 424 Mich. 89, 378 N.W.2d 472 (1985) 17

General Motors Corp. v. *Mendicki*, 367 F.2d 66 (10th Cir. 1966) 3

Hasten v. *Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981) 3, 9, 15

Hyles v. *Mensing*, 849 F.2d 1213 (9th Cir. 1988) 13

Johnson v. *Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989) 12

Kloch v. *Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985) 15, 16

Krasinski v. *United Parcel Service, Inc.*, 124 Ill. 2d 483, 530 N.E.2d 468 (1988) 15

Lingle v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) 4, 9, 10, 11, 12, 13

Cases—Continued: Page

Linn v. *United Plant Guard Workers Local 114*, 383 U.S. 53 (1966) 5, 14
Mock v. *Chicago, Rock Island & Pac. R.R.*, 454 F.2d 131 (8th Cir. 1972) 16
Neece v. *Kantu*, 84 N.M. 700, 507 P.2d 447 (Ct. App.), cert. denied, 507 P.2d 442 (1973) 15
Nelson v. *Lapeyrouse Grain Corp.*, 534 So. 2d 1085 (Ala. 1988) 15, 16
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 5, 6, 14
Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. *Austin*, 418 U.S. 264 (1986) .. 14
Petyan v. *Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986) 16
Reynolds Metals Co. v. *Mays*, 547 So. 2d 518 (Ala. 1989) 15
Rougeau v. *Firestone Tire & Rubber Co.*, 274 So. 2d 454 (La. Ct. App. 1973) 16
Shane v. *Greyhound Lines, Inc.*, 868 F.2d 1057 (9th Cir. 1989) 13
Sturdivant v. *Seaboard Service System, Ltd.*, 459 A.2d 1058 (D.C. 1983) 15, 16
Tellez v. *Pacific Gas & Electric Co.*, 817 F.2d 536 (9th Cir. 1987) 3, 13, 17
United Steelworkers v. *Rawson*, 110 S. Ct. 1904 (1990) 10, 11

Statutes and rule:

Labor-Management Relations Act of 1947, § 301, 29 U.S.C. 185 ..... 4, 5, 9, 10, 12, 13
28 U.S.C. 1257 17
Fed. R. Evid. 501 16

Miscellaneous:

Annotation, *Defamation: Publication by Intracorporate Communication of Employee's Evaluation*, 47 A.L.R.4th 674 (1986) 16
R. Sack, *Libel, Slander, and Related Problems* (1980) 8
R. Smolla, *Law of Defamation* (1989) 8

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1173

PUBLIC SERVICE COMPANY OF COLORADO, ET AL., PETITIONERS

v.

WILLARD A. THOMPSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. This case concerns the application of federal labor law to a defamation action filed by respondent Willard A. Thompson in Colorado state court against his employer, petitioner Public Service Company of Colorado, and his supervisor at the company, petitioner R.M. Richards. At the time of the dispute, respondent was represented by Local Union No. 111 of the International Brotherhood of Electrical Workers, which had a collective bargaining agreement with Public Service. Pet. App. 2a. Two separate incidents are at issue.

Respondent first claims that he was defamed by statements in a written notice sent to him by petitioner Richards on December 6, 1983. The letter informed re-

spondent that he was suspended for five days without pay for "poor work performance, creating a nuisance for customer employees and sexual harassment and/or unwanted contact of customer employees." Pet. App. 3a. A copy of the notice was sent to a limited number of management and union officials, and placed in respondent's personnel file. *Id.* at 4a. The collective bargaining agreement did not expressly require Public Service to provide written disciplinary notices. *Id.* at 25a-26a; Pet. 4 n.2.

Respondent challenged his suspension under the grievance mechanism established by the collective bargaining agreement. After a factual presentation to a joint union-management committee, the parties agreed to settle the dispute. Pet. App. 21a. The five-day suspension was reduced to two days, and the word "sexual" was removed from that portion of Richards' letter that accused respondent of "creating a nuisance for customer employees and sexual harassment and/or unwanted contact of customer employees." *Id.* at 3a, 4a. Respondent mounted no further challenge to the disciplinary suspension. *Id.* at 4a.

The second claim of defamation was based on a letter of reprimand issued to respondent by Richards on June 29, 1984. That letter (which was given the same limited circulation as the previous letter) accused respondent of "falsification" of his time card in claiming sick leave for June 5, 1984. Pet. App. 4a, 22a. According to Richards, respondent knew that he was required to have a doctor's excuse to be eligible for sick leave, and was aware that, by claiming leave without the required excuse, he had falsified the time card. *Id.* at 4a.

It is unclear whether respondent invoked the collective bargaining agreement's grievance procedures to protest this reprimand. Pet. App. 22a. Respondent did, however, take the reprimand directly to a third-level supervisor, who deleted the reference to "falsification." The revised letter of reprimand accused respondent of "malingering" and ignoring "required polic[ies] [and] procedures" in claiming sick leave on his time card. Respondent did not challenge the revised reprimand. *Id.* at 4a.

2. On December 3, 1984, respondent filed a state court complaint alleging that Richards' disciplinary notices defamed him. Pet. App. 4a, 22a-23a. In April 1987, the state trial court granted petitioners' motion for summary judgment. The court held that both disciplinary notices were protected by a qualified privilege under Colorado law. On the basis of exhibits and deposition excerpts, the trial court determined that there was no genuine issue as to actual malice and, accordingly, entered summary judgment in favor of petitioners. *Id.* at 28a-29a.

3. The Colorado Court of Appeals affirmed the district court's judgment on other grounds. The court of appeals decided that "national labor policy requires the recognition of an absolute privilege" for the letters of reprimand in issue. Pet. App. 24a-25a. The court accordingly concluded that federal labor law preempts the state law of qualified privilege otherwise applicable to these statements, and affirmed the dismissal of the action.

Relying on *General Motors Corp.* v. *Mendicki*, 367 F.2d 66 (10th Cir. 1966), and *Hasten* v. *Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981), the court determined that an absolute privilege extends not only to statements made during grievance conferences or arbitration hearings but also "to written notices of discipline which 'trigger' the initiation of such proceedings." Pet. App. 25a. The court acknowledged that in *Tellez* v. *Pacific Gas & Electric Co.*, 817 F.2d 536 (1987), the Ninth Circuit had ruled that the *Hasten* rule of absolute privilege is inapplicable to a notice of discipline not mandated by the collective bargaining agreement. In such circumstances, the *Tellez* court reasoned, such notice is not part of the "grievance process" required by the labor agreement. The Colorado appellate court nevertheless rejected the line drawn in *Tellez* and concluded that *Mendicki* and *Hasten* should be extended to the statements at issue even though "there is no evidence that the contract *required*" the notices of reprimand. Pet. App. 26a. The court of appeals further rejected the contention that petitioners had

abused their absolute privilege by publishing the two disciplinary notices to persons who did not have a legitimate interest in the dispute. *Id.* at 26a-27a.

4. The Colorado Supreme Court granted certiorari to consider whether "federal labor law, under the circumstances of this case, requires the recognition of an unqualified rather than a qualified privilege, as previously recognized by this court under state law with respect to statements similar to those made here." Pet. App. 5a. The court found that both the trial court and the court of appeals had erred, and reversed the entry of judgment in petitioners' favor.

a. With respect to the appellate court ruling, the state supreme court rejected the conclusion that, "under federal labor law, statements made by an employer in a notice of discipline may not be the basis of a defamation action." Pet. App. 2a. The court noted that, in *Churchey* v. *Adolph Coors Co.*, 759 P.2d 1336, 1346 (Colo. 1988), it had previously determined that an employer's statement that an employee had been terminated for dishonesty was protected by a qualified privilege under the Colorado state law of defamation. The *Churchey* privilege required the employee to prove that the defendant "publishe[d] the material with malice, that is, knowing the matter to be false, or act[ed] in reckless disregard as to its veracity." Pet. App. 5a. The Colorado Supreme Court then determined that, "under the facts of this case," federal labor law did not require preemption of the state defamation action governed by a qualified privilege. *Id.* at 6a.

First, the court rejected the argument that Section 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 185, preempted respondent's state tort defamation claim in its entirety. Applying the test in *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the court determined that respondent's claim was "independent" of the contract, because each element of the claim "may be resolved without reference to the collective bargaining agreement." Pet. App. 12a. The court found

that the decisions in *Mendicki* and *Hasten*, which recognized an absolute privilege for certain statements made in the course of grievance proceedings, could not support preemption under Section 301 in this case because they were decided prior to *Lingle*. The court indicated that, to the extent these cases were based upon a Section 301 preemption analysis, their "continuing validity is questionable" after *Lingle*. Pet. App. 8a.

The state supreme court also rejected petitioners' contention that there was any other basis "under the rubric of 'national labor policy' " for protecting petitioners' communications under an absolute or unqualified privilege. The court reasoned that "existing Supreme Court precedent suggests that a qualified privilege suffices" to safeguard the interests of national labor policy. Pet. App. 13a. The court explained that, in *Linn* v. *United Plant Guard Workers Local 114*, 383 U.S. 53 (1966), this Court decided that state law defamation actions arising from statements made during a union organizing campaign were not wholly preempted, and could instead proceed under the qualified privilege standard announced in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Because the court viewed the federal interest in free debate considered in *Linn* to be "quite similar to the federal interest in encouraging frank discussion in the context of a grievance proceeding or a disciplinary action," it found no basis for affording an absolute privilege for the communications in this case.[1] The court concluded that "a state law defamation action based upon [such] statements * * * may go forward when the state law

[1] At one point, the language of the opinion suggests that the Colorado Supreme Court was willing to *assume* for the purposes of its analysis that the statements in this defamation action were made "in a grievance or disciplinary proceeding" under a collective bargaining agreement. See Pet. App. 15a. The opinion does not make any finding to this effect, and does not take issue with the court of appeals' factual conclusion that the notices in issue were not required by the collective bargaining agreement or made during the course of a grievance proceeding.

recognizes a qualified privilege for [such] communications." Pet. App. 15a.[2]

b. With respect to the trial court ruling, the court found that summary judgment should not have been granted "under state law," because there was a "genuine issue of fact" concerning the existence of malice. Pet. App. 2a, 18a. Applying the summary judgment standards set forth in *Churchey*, *supra*, the court concluded that the affidavits and deposition excerpts established "that a genuine issue of fact exists with respect to whether Richards knew of the falsity of his statements or acted with reckless disregard as to the falsity of his statements contained in the letters in question." The court remanded the case for trial. Pet. App. 18a.

DISCUSSION

Petitioners concede that the Colorado Supreme Court "correctly applied the *Lingle* analysis" in concluding that "the determination of [r]espondent's defamation claims" does not require "an interpretation of the Collective Bar-

---

[2] It does not appear that the parties have ever raised (Pet. (i)), or that the Colorado Supreme Court ever resolved (Pet. App. 5a), the question of the scope of any qualified privilege that may be required by federal labor law in the circumstances of this case. Rather, in applying the qualified privilege under Colorado law, the state supreme court noted that the state standard was "virtually indistinguishable from the standard approved by the Supreme Court" in *Linn*, as borrowed from *New York Times Co.* v. *Sullivan*, *supra*. Pet. App. at 14a.

The court would appear to be correct insofar as the definition of malice is concerned. However, the court did not address the question of whether the burden of proof applicable to the issue of malice would be the same under state and federal law. See *New York Times Co.* v. *Sullivan*, 376 U.S. at 285-286 (malice must be proved with "convincing clarity"); see also *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (referring to *New York Times* "clear and convincing evidence" requirement). Since petitioner does not present the argument that the Colorado state law of qualified privilege is preempted in favor of a more protective qualified privilege under federal law, we refrain from addressing that issue.

gaining Agreement." Pet. 9-10. They nevertheless contend (Pet. 8-13) that the state defamation action in this case is completely preempted by "federal labor policy," because the grievance process established by a collective bargaining agreement cannot function properly unless participants enjoy an absolute privilege for defamatory statements relating to such proceedings. They assert that the need for this absolute privilege extends even to statements, such as those in issue here, that precede the employee's decision to invoke the grievance process established by the collective bargaining agreement, and that are not otherwise found to be mandated by the contract. Further, petitioners assert that review is required to resolve a conflict among state and federal courts on the question presented.

We disagree. Collective bargaining agreements typically establish procedures for resolution of employee grievances through various means, including settlement meetings, hearings conducted by labor-management committees, and binding arbitration. There is no dispute that the notices of reprimand at issue gave rise to a grievance that could be redressed through such contractual procedures. But the factual findings in this case do not establish that these disciplinary notices were also part of the grievance resolution process mandated by the collective bargaining agreement. Indeed, the state court of appeals found that the notices were not even required by the agreement as the first step in the grievance process. Pet. App. 26a.[3] The rule advanced by petitioners in this case would accordingly serve as a com-

[3] Petitioners concede that the collective bargaining agreement did not contain an express requirement that the employer send a written disciplinary notice, Pet. 4 n.2, but now suggest that the requirement for such notice was impliedly incorporated into the agreement by past practice. However, the Colorado Court of Appeals found that "there is no evidence that the contract *required* such a written notification" (Pet. App. 26a) and the Colorado Supreme Court was silent on the issue. We therefore consider the legal issue based upon the lower court's findings of fact.

plete bar to any state defamation action directed at a broad class of statements made in the course of an employment relationship.[4] Nothing in federal law or labor policy mandates this result, and it would be inconsistent with this Court's decisions.[5]

We recognize that some confusion exists in lower court decisions concerning the source and scope of privileges applicable to statements made during grievance hearings, arbitration, and other procedures pursuant to collective bargaining agreements.[6] Greater clarity in this broad area is plainly desirable. But none of those decisions has concluded that federal labor law absolutely bars a defamation action where, as here, the claim is based upon statements that are not part of the process prescribed by a labor contract, and where the claim can be resolved without interpretation of the collective bargaining agreement. Accordingly, we do not believe that review of this case is likely to provide the Court with the appropriate vehicle for resolving the issue that divides some of the lower courts: whether statements made in accordance with grievance procedures established by a collective bargaining agreement are absolutely privileged under federal

---

[4] Complete preemption of the state law of defamation by federal labor law is conceptually distinct from an "absolute privilege" against liability for defamation. Preemption involves the displacement of a state cause of action by federal law, whereas an absolute privilege—which is sometimes recognized under state law for a narrow class of cases, see note 15, *infra*—is a defense to an otherwise valid cause of action. See R. Smolla, *Law of Defamation* §§ 8.02, 8.03 (1989); R. Sack, *Libel, Slander, and Related Problems* 268-278, 284-287 (1980). Because complete preemption and an absolute privilege—to the extent it applies—have the same effect of barring recovery for defamation, courts do not always distinguish between the two doctrines.

[5] Although we do not believe that an absolute privilege is required by federal law for the statements in issue here, we do not rule out the need for extending an absolute privilege to statements made in other contexts, such as in the course of a grievance hearing conducted under a collective bargaining agreement. See notes 13 & 15, *infra*.

[6] See pp. 15-16, *infra*.

labor law. Compare, *Hasten* v. *Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981), with *Ezekiel* v. *Jones Motor Co.*, 374 Mass. 382, 372 N.E.2d 1281 (1978). That issue simply is not presented on this record.

1. a. Insofar as the Colorado Supreme Court held that Section 301 of the LMRA does not preempt respondent's defamation claim, its decision was correct. Section 301, by its terms, provides federal jurisdiction over "[s]uits for violation of contracts" entered into by employers and organized labor. This Court has held that Section 301 preempts not only lawsuits to enforce the terms of collective bargaining agreements, but also claims that require interpretation of those agreements. As explained in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 220 (1985):

> [W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, see *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557 (1968), or dismissed as pre-empted by federal labor-contract law.

In *Lingle*, 486 U.S. at 401-412, the Court determined that an employee who had challenged her discharge under the grievance procedures of a collective bargaining agreement could also pursue a parallel state court action for wrongful discharge that required her to establish that she had been discharged in retaliation for filing a workers' compensation claim. *Id.* at 402, 407-409. The Court reasoned that Section 301 preempts a state cause of action if, and only if, resolution of the state law claim "require[s] construing the collective-bargaining agreement." 486 U.S. at 407. The Court concluded that, "even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent'

of the agreement for § 301 pre-emption purposes." *Id.* at 409-410. The Court found that the dispute resolution mechanism established by the collective bargaining agreement would not be impermissibly undermined by the availability of such parallel state damage actions. *Id.* at 411-413.

Petitioners' concession (Pet. 9-10) that the Colorado Supreme Court correctly applied *Lingle* is fatal to their argument that the preemptive force of Section 301 extends to respondent's defamation claims. Under *Lingle*, a state tort suit is not preempted merely because it relates to a dispute that can be resolved by methods established through a collective bargaining agreement.[7] Rather, the test is whether resolution of the claim requires interpretation of the agreement. Here, all parties agree that it does not; thus, Section 301 does not preempt this action.[8]

Contrary to petitioners' contention (Pet. 11), the Court's decision in *United Steelworkers* v. *Rawson*, 110

---

[7] See, *e.g.*, *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 25 n.28 (1983) (noting, by way of example, that "a state battery suit growing out of a violent strike would not arise under § 301 simply because the strike may have been a violation of an employer-union contract"). Petitioners contend that *Lingle* would permit preemption of some state law actions that work too great an interference with the grievance process—even where interpretation of the contract was not required—but that rationale for preemption would not be implicated here. As explained below, pp. 13-14, *infra*, we do not believe that preemption or an absolute privilege is required for statements such as these to assure the proper functioning of the dispute resolution process.

[8] Under the rationale adopted by some courts, see pp. 13, 14-17, *infra*, which distinguish between communications that are mandated by the agreement and those that are not, the determination of whether an absolute or qualified privilege applies can require a court to look to the collective bargaining agreement. We do not believe that the need to resolve the threshold contractual issue of whether a communication is required by the agreement calls for preemption. This Court recognized in *Lingle*, 486 U.S. at 413 n.12, that collateral issues of contract interpretation arising in state actions can be resolved under federal labor law by state courts.

S. Ct. 1904 (1990) does not lead to a different result. In *Rawson*, the employee accused the union of negligently breaching its duty to conduct safety inspections of a mine. That duty "ar[ose] out of the collective bargaining agreement signed by the Union as the bargaining agent for the miners." *Id.* at 1910. The Court explained that the union was not accused of violating any "duty of reasonable care owed to every person in society"; rather, its duty to inspect the mine had its source in the contract. *Id.* at 1910-1911. The Court concluded that the state law tort action against the union for negligent breach of duty was preempted by Section 301 because "the duty to the employee of which the tort is a violation is created by a collective agreement and without existence independent of the agreement." 110 S. Ct. at 1909.

The state tort claim in *Rawson* was not "independent" of the collective bargaining agreement "in the sense of 'independent' that matters for § 301 pre-emption purposes." *Lingle*, 486 U.S. at 407. Without referring to the union's agreement with the employer, it was impossible in *Rawson* to ascertain whether the union had breached any obligation to the employees. The state tort action thus could not be resolved without interpretation of the labor agreement itself. Here, in contrast, the employer's duty to refrain from defaming respondent does not stem from any contract between the parties; rather, it is a duty that is "owed to every person in society." *Rawson*, 110 S. Ct. at 1910-1911. The determination whether petitioners possessed such a duty—and, therefore, whether the duty was breached—can be made without referring to the contract at all.[9] There is, accord-

[9] Petitioners' assertion (Pet. 11) that their obligations "concerning the grievance procedure and issuing disciplinary notices arose out of the Collective Bargaining Agreement" is factually unsupported and, in any event, misses the mark. The duty that petitioners allegedly breached was not the contractually imposed duty to comply with the procedures for processing grievances, but, rather, the state-imposed duty not to injure respondent's reputation by know-

ingly, no basis for concluding that Section 301 mandates preemption of state defamation actions such as this one, which do not require interpretation of the collective bargaining agreement.

b. We do not share petitioners' view (Pet. 14-15) that the decision below conflicts with two decisions of the courts of appeals finding particular defamation claims preempted by Section 301. Our reasons are these: Application of *Lingle* is necessarily fact specific; both cases are factually distinguishable from the claim in issue; and the reasoning adopted by those circuits indicates that those courts would not hold that Section 301 preempts respondent's claims.

In *Johnson* v. *Anheuser Busch, Inc.*, 876 F.2d 620, 624 (8th Cir. 1989), the defamation claim was based on accusations of misconduct by the plaintiff's co-workers, which allegedly caused the plaintiff's discharge. The court determined that resolution of the defamation claim "would necessarily involve construction of the collective bargaining agreement to determine whether [the plaintiff] was wrongfully discharged." Since the defamation claim could not be resolved "without interpreting or analyzing the terms of the * * * agreement," the court concluded that it fell within the preemptive scope of Section 301 under this Court's decision in *Lingle*, *supra*. 876 F.2d at 624.

Although the Eighth Circuit correctly articulated the *Lingle* standard for determining preemption, we are less certain that the standard was correctly applied. A defamation claim in the employment context might well be preempted by *Lingle* in certain factual situations, but the Eighth Circuit did not explain how the validity of the plaintiff's discharge under the terms of the contract might affect the disposition of the defamation claim. It is clear, however, that the Eighth Circuit would not have found preemption under the present circumstances, where the

---

ingly uttering falsehoods. A duty to speak can be imposed by a variety of agreements, but that does not excuse the speaker from the state law duty to speak in a manner that does not defame others.

parties concede that resolution of the claim does not require interpretation of the agreement. In any event, a possibly erroneous application of *Lingle* to a particular set of facts by a court of appeals would not, in our view, independently warrant review of this case.

Petitioners also contend (Pet. 14-15) that the Colorado decision is in conflict with *Shane* v. *Greyhound Lines, Inc.*, 868 F.2d 1057, 1063 (9th Cir. 1989), but that case presents an issue not decided here. In *Shane*, the court of appeals made an express finding that the collective bargaining agreement obligated the employer to send the employee the disciplinary notice that contained the allegedly defamatory statements, and the court based its finding of preemption on that fact. What is more, in an earlier case, the Ninth Circuit rejected the claim that Section 301 preempts a defamation action arising from statements in a suspension letter that was not mandated by the collective bargaining agreement. See *Tellez* v. *Pacific Gas & Electric Co.*, 817 F.2d 536, 538-539 (1987). Because the state court found that there was "no evidence" that the notices in issue here were "required" by the collective bargaining agreement, the Ninth Circuit presumably would apply *Tellez*, not *Shane*, and hold that this claim is not preempted by Section 301.[10]

2. a. Because Section 301 completely preempts only those state law claims that cannot be resolved without reference to a collective bargaining agreement, that provision does not operate to bar the state defamation claims at issue here. We do not share petitioners' view (Pet.

---

[10] See also *Hyles* v. *Mensing*, 849 F.2d 1213, 1215-1216, 1217 (9th Cir. 1988) (statements made in the course of a grievance hearing preempted by Section 301). The Section 301 analysis employed in *Shane* can be questioned. The fact that a communication is required by the collective bargaining agreement does not establish that resolution of the claim meets the *Lingle* test of required contract interpretation. See note 8, *supra*. However, there are not enough facts set forth in the *Shane* opinion to determine whether, under the rule in *Lingle*, interpretation of the labor contract was necessary to resolve the defamation claim.

6-9) that federal labor policy nevertheless requires that the state law of qualified privilege be displaced by an absolute privilege in this case. In our view, there is no basis for petitioners' assertion that absolute protection for disciplinary statements in the workplace is necessary for grievance and arbitration mechanisms to work effectively. A qualified privilege standard that requires a plaintiff to prove actual malice affords employers wide latitude in revealing the grounds for disciplinary action. We do not believe that the success of the grievance process depends upon a right to include knowing or reckless falsehoods in such communications.

Petitioners have not advanced any persuasive reason why a notice of reprimand is entitled to greater protection than the communications at issue in *Linn* v. *United Plant Guard Workers Local 114*, 383 U.S. 53 (1966), or *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264 (1974), where this Court held that the federal interest was sufficiently protected by adhering to a qualified privilege standard borrowed from *New York Times* v. *Sullivan*, *supra*. In those cases, the Court acknowledged that federal labor policy requires that parties be allowed substantial freedom to engage in vigorous speech in the course of an organizational campaign or union membership drive, but nevertheless found that preemption (and implicitly, an absolute privilege) was unnecessary to vindicate that policy. That result should control the outcome here.[11]

b. We also do not believe that the judgment of the Colorado Supreme Court is in conflict with the judgment of any other court. We recognize that some courts have held that certain types of communications made in the

---

[11] Exposure to the costs of defending defamation actions can inhibit speech. But this Court has already determined that this rationale does not require preemption of defamation actions directed at statements made by employees in the course of concerted activity. See *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983). An employer should not be afforded greater protection in this context.

course of procedures prescribed by a collective bargaining agreement for the resolution of employment disputes are entitled to an absolute privilege under federal labor law. See, *e.g.*, *Hasten* v. *Phillips Petroleum Co.*, 640 F.2d 274, 278 (10th Cir. 1981); *Nelson* v. *Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1089, 1092 (Ala. 1988). It is also true as petitioners discuss (Pet. 13-16), that there is disagreement among certain decisions: some courts apply an absolute privilege to all communications made in the course of procedures required by the contract;[12] some have restricted the application of this absolute privilege to statements made in grievance hearings;[13] some suggest that an absolute privilege might never be required;[14] and some apply an absolute privi-

---

[12] *Hasten* v. *Phillips Petroleum Co.*, 640 F.2d 274, 278 (10th Cir. 1981) (applying absolute privilege to discharge letter that the employer was required to send under the collective bargaining agreement because "federal labor law and policy require the absolute privilege rule as to communications made within the context of proceedings provided for by the collective bargaining agreement and its provisions for a grievance machinery"); *Neece* v. *Kantu*, 84 N.M. 700, 705, 507 P.2d 447, 452 (Ct. App.) (statements made in a letter that "constituted a disposition of plaintiff's grievance after a hearing" enjoy an absolute privilege), cert. denied, 507 P.2d 442 (1973).

[13] See *Nelson* v. *Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1089, 1092 (Ala. 1988) (extending an absolute privilege, apparently under federal law, to statements made in the course of hearings to resolve a grievance, but applying qualified privilege to accusations made in an investigation prior to initiation of grievance proceeding) and *Reynolds Metals Co.* v. *Mays*, 547 So. 2d 518 (Ala. 1989) (telegrams to employees notifying them of disciplinary action and dismissal are protected only by a qualified privilege). See also *Sturdivant* v. *Seaboard Service System, Ltd.*, 459 A.2d 1058 (D.C. 1983) (absolute privilege protects communications by participants in labor arbitration proceedings); *Kloch* v. *Ratcliffe*, 221 Neb. 241, 245-248, 375 N.W. 2d 916, 919-921 (1985) (statements in investigatory hearing held pursuant to an agreement governed by the Railway Labor Act are absolutely privileged).

[14] See, *e.g.*, *Krasinski* v. *United Parcel Service, Inc.*, 124 Ill. 2d 483, 486-492, 530 N.E.2d 468, 469-472 (1988) (accusations of dis-

lege under state law.[15] But none is in conflict with the

---

honesty prior to discharge, and in discharge notice required under contract, are actionable under *Linn/New York Times* qualified privilege standard); *Ezekiel* v. *Jones Motor Co.*, 373 Mass. 382, 385-388, 372 N.E. 2d 1281, 1284-1286 (1978) (statements made to grievance board "revealing grounds for [plaintiff's] termination" are entitled only to qualified privilege.)

[15] Absent superseding federal law, the state law of privilege controls in actions arising under state defamation law, whether in state or federal court. See Fed. R. Evid. 501 (state law of privilege applies in "civil actions * * * as to which State law supplies the rule of decision"). Some states effectively accord an absolute privilege, on independent state grounds, to certain communications in the employment context. See, *e.g.*, *Petyan* v. *Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986) (defamatory communications to state unemployment compensation board absolutely privileged); *Sturdivant* v. *Seaboard Service System, Ltd.*, 459 A.2d 1058 (D.C. 1983) (absolute privilege for participants in arbitration adopted, in part, to protect court's new alternative dispute resolution machinery); *Rougeau* v. *Firestone Tire & Rubber Co.*, 274 So. 2d 454 (La. Ct. App. 1973) (unqualified privilege for statements made in connection with investigation of employee for theft of employer's property); *Nelson* v. *Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1093-1094 (Ala. 1988) (defamatory communications between managerial employees concerning corporate business not actionable because not a "publication" under state law); Annotation, *Defamation: Publication by Intracorporate Communication of Employee's Evaluation*, 47 A.L.R.4th 674 (1986) (discussing the jurisdictions that afford no defamation remedy for communications within the corporation itself).

Some courts have suggested that statements made in the course of grievance or arbitration proceedings are entitled to protection under the common law absolute privilege that applies to statements made in a quasi-judicial setting. See, *e.g.*, *Mock* v. *Chicago, Rock Island & Pac. R.R.*, 454 F.2d 131, 133 (8th Cir. 1972) (discussing the "absolute privilege" that may "attach[] to relevant statements made during administrative proceedings which are 'quasi-judicial' in nature"), and cases cited therein; *Kloch* v. *Ratcliffe*, 221 Neb. 241, 245, 375 N.W.2d 916, 919 (1985) (relying in part on state law cases recognizing absolute privilege for statements in connection with "quasi-judicial" proceedings to hold that statements in investigatory hearing held pursuant to an agreement governed by the Railway Labor Act are absolutely privileged); *Corbin* v. *Washington Fire & Marine Ins. Co.*, 278 F. Supp. 393, 395-397 (D.S.C. 1968) (absolute privilege attaches to presentation of testimony and argument before a board of arbitrators in a private dispute).

result in this case: no court has recognized an absolute privilege under the general rubric of federal labor policy for communications not found to be required by the terms of the collective bargaining agreement, nor made in the course of grievance procedures established by the contract. See *Tellez* v. *Pacific Gas & Electric Co.*, 817 F.2d at 538-539 (expressly declining to extend an absolute privilege to disciplinary notices "neither required by the collective bargaining agreement, nor a part of the grievance process").[16] Because the factual predicates for the decisions recognizing an absolute privilege are missing in this case, it cannot be said that the Tenth Circuit, or any other court, would decide this case differently.[17]

---

[16] Petitioner cites *Fulghum* v. *United Parcel Service, Inc.*, 424 Mich. 89, 102-105, 378 N.W. 2d 472, 478-479 (1985) as recognizing an absolute privilege for an employer's accusations of dishonesty against an employee at the time of his suspension. The discussion on which petitioner relies is found in a concurring opinion, and did not command a majority of the court. See 424 Mich. at 92-93, 378 N.W.2d at 473.

[17] The petition in this case is interlocutory, since the Colorado Supreme Court denied petitioners' motion for summary judgment and remanded for trial. In the government's view, there is no jurisdictional obstacle to review of this decision, which would appear to qualify under an exception to the final judgment rule. See 28 U.S.C. 1257; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-486 (1975); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497-498 n.5 (1983). Nevertheless, it should be noted that if the Court declines to review the decision at this time, and if petitioners receive an adverse decision on the defamation claims after a full trial on the merits, they will have another opportunity to present their contentions to the Court in a petition for a writ of certiorari seeking review of the final judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MAUREEN E. MAHONEY
Deputy Solicitor General

AMY L. WAX
Assistant to the Solicitor General

OCTOBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45108

(5)

No. 90-1173

Supreme Court, U.S.
FILED
NOV 8 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,
Petitioners,

v.

WILLARD A. THOMPSON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

---

REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

DAVID W. KERBER *
KEVIN W. HECHT
KELLY, STANSFIELD & O'DONNELL
550 15th Street, Suite 900
Denver, Colorado 80202
(303) 825-3534

JAMES R. MCCOTTER
General Counsel
PUBLIC SERVICE COMPANY OF COLORADO
550 15th Street, Suite 890
Denver, Colorado 80202
(303) 571-7161

Attorneys for Petitioners, Public Service Company of Colorado and R. M. Richards

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTRODUCTION	1
DISCUSSION	2
I. CONTRARY TO THE CONTENTION OF THE AMICUS, THE DISCIPLINARY NOTICES AT ISSUE HERE WERE REQUIRED BY THE COLLECTIVE BARGAINING AGREEMENT	2
II. THE CONFLICT OF AUTHORITY THROUGHOUT THE LOWER COURTS REQUIRES GUIDANCE FROM THIS COURT	4
CONCLUSION	7
APPENDIX A	
Excerpt From Record Below	1a

TABLE OF AUTHORITIES

Cases: Page

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 7

Hasten v. Phillips Petroleum Co., 640 F.2d 274 (10th Cir. 1981) 6

Int'l. Bhd. of Elec. Workers, Local 1228 v. WNEV-TV, 778 F.2d 46 (1st Cir. 1985) 4

Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989) 5

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) 5

Shane v. Greyhound Lines, Inc., 868 F.2d 1057 (9th Cir. 1989) 5

Strathmore Paper Co. v. United Paperworkers Int'l. Union, Local 197, 900 F.2d 423 (1st Cir. 1990) 4

Textile Workers v. Lincoln Mills of Alabama, 353 U.S. 448 (1957) 5, 6

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 4

Other:

Elkouri and Elkouri, *How Arbitration Works*, 437 (4th ed. 1985) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1173

PUBLIC SERVICE COMPANY OF COLORADO
and R. M. RICHARDS,
Petitioners,

v.

WILLARD A. THOMPSON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

---

REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTRODUCTION

On April 22, 1991, the Court invited the Solicitor General to file a brief expressing the views of the United States in this case. On October 23, 1991, the Solicitor General filed his brief for the United States as Amicus Curiae (Amicus), recommending that the Petition for a Writ of Certiorari be denied. Due to a critical error in fact which forms the principal basis of the Amicus' position, this Reply is necessary.

DISCUSSION

I. CONTRARY TO THE CONTENTION OF THE AMICUS, THE DISCIPLINARY NOTICES AT ISSUE HERE WERE REQUIRED BY THE COLLECTIVE BARGAINING AGREEMENT.

The Amicus relies upon a fact assumed by it that the disciplinary notices at issue here were not required by the Collective Bargaining Agreement between the parties. (Amicus Brief at pp. 2, 3, 5 n.1, 7, 7 n.3, 8, 11 n.9, 13, 17). This single misapprehension of fact is the essential factor that drives the Amicus' position. This mistake is based upon an erroneous comment contained in the decision of the Colorado Court of Appeals that there was no evidence in the record that the Collective Bargaining Agreement required written notification. (Pet. App. 26a).[1]

From a review of the Colorado Court of Appeals' decision, it is clear that whether the disciplinary notices were required by the Collective Bargaining Agreement or not was irrelevant to that court's decision. (Pet. App. 26a). The Court of Appeals determined that even in the case where notices were not required by the Collective Bargaining Agreement, an absolute privilege still would be applied. (*Id.*) As such, the statement of the Court of Appeals that there is no evidence in the record that written notices were required by the Collective Bargaining Agreement is not a finding of fact, as the Amicus contends, but merely dicta.

Indeed, the Colorado Supreme Court was willing to assume, for purposes of its opinion, that the notices were required by the Collective Bargaining Agreement. (Ami-

---

[1] Nevertheless, Amicus admits that at one point the Colorado Supreme Court was willing to assume, for the purposes of its analysis, that the statements were made in a grievance or disciplinary proceeding under a collective bargaining agreement. (Amicus Brief at p. 5 n.1).

cus Brief at p. 5 n.1). The reason that the Colorado Supreme Court was willing to consider such a fact is that the record before the Colorado Court of Appeals as well as the Colorado Supreme Court *did* contain unrebutted evidence that there was a requirement to provide written disciplinary notices to the Union pursuant to the Collective Bargaining Agreement. In an affidavit submitted in support of Public Service Company's Motion for Summary Judgment in the trial court and contained in the record before the Court at R. 36, ¶ 4, Gary Goodwin, Petitioner's Director of Labor Relations, stated:

> Public Service has a long standing policy of issuing written letters of reprimand and letters of suspension. There has also been a long standing practice and policy relating to bargaining unit employees, such as Plaintiff, that a copy of any discipline be sent to the Union. This practice is so well established as to constitute a post [sic] practice under the Collective Bargaining Agreement (Article 30). Failure to provide the Union with a copy of the written letter of suspension and the written letter of reprimand would have constituted a violation of the Collective Bargaining Agreement.

(Appendix A at p. 2a, attached hereto).[2] There is no evidence in the record which challenges this conclusion.

It is an elementary principle of labor law that in addition to the written provisions of a collective bargaining

---

[2] This excerpt from the record will be part of the record before this Court should the Petition for a Writ of Certiorari be granted. Petitioners invite the Court, pursuant to Supreme Ct. Rule 12.5, to have the record transmitted at this juncture. Alternatively, this Court could grant the Petition subject to confirmation of the affidavit's inclusion. Should the mandatory effect of past practice between Petitioner and I.B.E.W. Local 111 as to the requirement that disciplinary notices be in writing not be borne out by the record, this Court could dismiss the Writ as improvidently granted. The Court should not deny this Petition for Writ of Certiorari based upon an erroneous understanding as to the facts involved in this case. This is particularly true when this fact plays such a dominant role in the Amicus' Brief.

agreement, past practices established by the parties' conduct may raise those practices to such a significance that they are incorporated in the collective bargaining agreement even though not specifically mentioned. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960); *Strathmore Paper Co. v. United Paperworkers Int'l. Union, Local 197*, 900 F.2d 423, 428 (1st Cir. 1990); *Int'l. Bhd. of Elec. Workers, Local 1228 v. WNEV-TV*, 778 F.2d 46, 48-49 (1st Cir. 1985) (quoting *Warrior & Gulf*, 363 U.S. at 581-82, "industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."), *cert. denied*, 476 U.S. 1182 (1986). *See also*, Elkouri and Elkouri, *How Arbitration Works*, (4th ed. 1985). Since the record in the court below shows that the disciplinary notices were required by the Collective Bargaining Agreement through the doctrine of past practice, the major reason for the Amicus' recommendation not to grant the Writ of Certiorari is no longer present.

II. THE CONFLICT OF AUTHORITY THROUGHOUT THE LOWER COURTS REQUIRES GUIDANCE FROM THIS COURT.

Absent the factual error relied upon by the Amicus, it appears that the Amicus would favor review of this issue[3] The Amicus states:

> We recognize that some confusion exists in lower court decisions concerning the source and scope of privileges applicable to statements made during grievance hearings, arbitration, and other procedures pursuant to collective bargaining agreements. *Greater*

[3] The Amicus states that "we also do not believe that the judgment of the Colorado Supreme Court is in conflict with the judgment of any other court." (Amicus Brief at p. 14). As stated above, this conclusion is based solely upon an assumption by the Amicus that the disciplinary letters were not required to be in written form by the terms of the Collective Bargaining Agreement. (*Id.* at p. 17).

> *clarity in this broad area is plainly desirable.* (Emphasis added.)

(Amicus Brief at p. 8).

We believe that the confusion that exists in the lower courts is indeed greater than "some confusion," as evidenced by the long recitation of conflicting authorities by Petitioners in their Petition at pp. 13-16 and the Amicus in its Brief at pp. 12-13, 14-17 and the accompanying footnotes. However, while there may be a slight disagreement as to the extent of the confusion that exists in the lower courts, we do agree completely with the Amicus that "greater clarity in this broad area is plainly desirable." (Amicus Brief at p. 8).

Textile Workers v. Lincoln Mills of Alabama, 353 U.S. 448 (1957), authorizes federal courts to fashion a body of federal common law involving federal labor policy to be applicable throughout the country. This is clearly necessary in this particular area, where courts over the years have been struggling with the issue of the privilege to be accorded disciplinary notices and statements made during grievance proceedings.[4]

The attempts of the Amicus to distinguish certain cases are not persuasive. The suggestion that the *Johnson v. Anheuser Busch, Inc.*, 876 F.2d 620 (8th Cir. 1989), and *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057 (9th Cir. 1989), were wrongly decided is not helpful, in that these cases definitely suggest that the Eighth and Ninth Circuits apply *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), in a manner inconsistent with Amicus' views as to what the law should be. This underscores the need for this Court to take and consider this matter, rather than letting this confusion continue. Also, it is quite clear that the Colorado Supreme Court decision

---

[4] Indeed, the six months that the Amicus required to develop its position in this case is a reflection of the difficulty and the confusion that exist throughout the country at large.

here is directly contrary to *Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981). It is intolerable to reasoned jurisprudence that within the same state the outcome of a case applying federal labor law may depend merely on whether a party can obtain jurisdiction in the federal courts rather than the state courts.

The determination of what type of privilege, whether absolute or qualified, exists in the context of grievance and arbitration proceedings is one for the Supreme Court. The Amicus offers its opinion that a qualified privilege should be applied nationwide. The Amicus states that, "*in our view*, there is no basis for petitioners' assertion that absolute protection for disciplinary statements in the workplace is necessary for grievance and arbitration mechanisms to work effectively." (Emphasis added.) (Amicus Brief at p. 14). On the other hand, Petitioners believe, and common sense dictates, that only an absolute privilege can effectively safeguard the free and open communication of parties to a collective bargaining agreement in matters of discipline. Nevertheless, this difference of opinion is not a reason for denying this Petition for Writ of Certiorari. Only after a full articulation of the views of the parties and any amici who may participate should this Court decide, pursuant to *Textile Workers v. Lincoln Mills*, the law to be applicable throughout the country in an area which has, based upon the cases cited by both Petitioners and the Amicus, confounded uniform application.[5]

---

[5] The Amicus admits that there is no jurisdictional obstacle to review of this decision. (Amicus Brief, p. 17 n.17). Nevertheless, the Amicus contends that this matter could be reviewed after a full trial and presumably subsequent appeals through the Colorado Court of Appeals and the Colorado Supreme Court. (*Id.*) The Colorado Supreme Court's judgment is plainly final on this federal issue and is not subject to further review in the state courts. While Petitioners here may very well prevail at trial on the non-federal grounds, if the Colorado Supreme Court improperly applied the issue of privilege, there should be no trial at all. Moreover, if Petitioners do prevail at trial and make unnecessary further considera-

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Colorado.

Respectfully submitted,

DAVID W. KERBER *
KEVIN W. HECHT
KELLY, STANSFIELD & O'DONNELL
550 15th Street, Suite 900
Denver, Colorado 80202
(303) 825-3534

JAMES R. MCCOTTER
General Counsel
PUBLIC SERVICE COMPANY OF COLORADO
550 15th Street, Suite 890
Denver, Colorado 80202
(303) 571-7161

Attorneys for Petitioners, Public Service Company of Colorado and R. M. Richards

* *Counsel of Record*

---

tion of this question, there would remain in effect the unreviewed decision of the State Supreme Court that disciplinary notices and statements made during grievance proceedings are only entitled to a qualified privilege rather than an absolute privilege. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975).

APPENDICES

APPENDICES

APPENDIX A

DISTRICT COURT
CITY AND COUNTY OF DENVER
STATE OF COLORADO

Civil Action No. 84 CV 12173
Courtroom 2

WILLARD A. THOMPSON,
Plaintiff,
v.
PUBLIC SERVICE COMPANY OF COLORADO, a Colorado corporation, and R.M. RICHARDS a/k/a R. MARK RICHARDS,
Defendants.

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

AFFIDAVIT OF GARY GOODWIN

I, Gary Goodwin, being first duly sworn state as follows:

1. My name is Gary Goodwin. I am the Director of Labor Relations for Public Service Company of Colorado. I have responsibility for administration of all Collective Bargaining Agreements and advising authority in the imposition of discipline on all employee's bargaining units or otherwise. Unless otherwise indicated, I have personal knowledge of all of the following facts.

2. Public Service Company of Colorado has a Collective Bargaining Agreement with the International Brother-

hood of Electrical Workers (IBEW) Local Union No. 111 which covers operating, production and maintenance employees of the Company. Plaintiff is a member of that bargaining unit and is covered by the Collective Bargaining Agreement.

3. The Collective Bargaining Agreement gives Public Service the right to discipline employees for proper cause (Article 2, Section 1) subject to review in the grievance and arbitration procedures (Articles 27 and 28). The December 6, 1983 suspension and the June 29, 1984 written reprimand were subject to review in the grievance and arbitration procedure.

4. Public Service has a long standing policy of issuing written letters of reprimand and letters of suspension. There has also been a long standing practice and policy relating to bargaining unit employees, such as Plaintiff, that a copy of any discipline be sent to the Union. This practice is so well established as to constitute a post practice under the Collective Bargaining Agreement (Article 30). Failure to provide the Union with a copy of the written letter of suspension and the written letter of reprimand would have constituted a violation of the Collective Bargaining Agreement.

5. It is the usual policy of Public Service Company of Colorado's Supervisors when documenting any discipline, to send copies of such documentation to the disciplined employee's upper level supervisors, and to the Public Service Company's Labor Relations Department.

6. It is the policy of Public Service Company, which policy is in compliance with federal labor law, that whenever a bargaining unit employee is questioned and that questioning may lead to discipline, that a union steward be provided to represent the employee.

DATED this 13th day of October, 1986.

/s/ Gary Goodwin
GARY GOODWIN

Subscribed and sworn to before me this 13th day of October, 1986, by Gary Goodwin.

WITNESS MY HAND AND OFFICIAL SEAL.

/s/ Karen L. Harr
Notary Public

My commission expires: June 6, 1988.